No. 87-157

(5)

Supreme Court, U.S.
FILED
NOV 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLIED TUBE & CONDUIT CORPORATION,

Petitioner,

vs.

INDIAN HEAD, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

MARVIN E. FRANKEL
(Counsel of Record)
ROBERT M. HELLER
ARTHUR B. KRAMER
ERIC O. CORNGOLD
DEBORA K. GROBMAN
JONATHAN D. POLKES
JEFFREY S. TRACHTMAN
KRAMER, LEVIN, NESSEN,
KAMIN & FRANKEL
919 Third Avenue
New York, New York 10022
(212) 715-9100
Counsel for Petitioner

FREDRIC W. YERMAN
(Counsel of Record)
MICHAEL MALINA
RANDOLPH S. SHERMAN
IRA S. SACKS
RICHARD A. DE SEVO
BERT L. SLONIM
DONNA M. GERBER
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 836-8000
Counsel for Respondent

94 pgs

PETITION FOR CERTIORARI FILED JULY 23, 1987
CERTIORARI GRANTED OCTOBER 5, 1987

TABLE OF CONTENTS

PAGE

Relevant Docket Entries in the District Court ..... J.A. 1

Relevant Docket Entries in the Court of Appeals ..... J.A. 3

Complaint, Indian Head, Inc. v. Allied Tube & Conduit Corporation and National Fire Protection Association; October 9, 1981 ..... J.A. 4

Answer, Allied Tube & Conduit Corporation; January 18, 1982 ..... J.A. 16

Jury's Answer to Special Interrogatories (Special Verdict); April 9, 1985 ..... J.A. 23

Court's Charge (Damages); April 23, 1985 (Tr. 3258-73) ..... J.A. 26

Jury's Answer to Special Interrogatory (Special Verdict on Damages); April 25, 1985 ..... J.A. 36

Argument of Defendant Allied Tube & Conduit Corporation's Motion for Judgment Notwithstanding the Verdict; June 27, 1986 ..... J.A. 37

Order Granting Judgment Notwithstanding the Verdict and Denying Motion for a New Trial; July 31, 1986 ..... J.A. 73

Judgment Entering Judgment Notwithstanding the Verdict of the District Court; July 31, 1986 ..... J.A. 75

Judgment of Court of Appeals Vacating District Court Judgment; April 22, 1987 ..... J.A. 77

PAGE

Letter dated February 29, 1980, from Taylor to Chehi, filed as Plaintiff's Exhibit 50 in the District Court on October 14, 1986 ..... J.A. 79

Memorandum dated January 22, 1980, from O'Donnell to Griffin, filed as Plaintiff's Exhibit 118 in the District Court on October 14, 1986 ..... J.A. 83

Memorandum dated January 30, 1980, from Griffin to Feeney, Weiss, Dooner & J. O'Donnell re: Art. 331—Electrical Nonmetallic Tubing (ENMT), filed as Plaintiff's Exhibit 127 in the District Court on October 14, 1986 ..... J.A. 84

Letter dated February 25, 1980, from Taylor to Wilkens, filed as Plaintiff's Exhibit 139 in the District Court on October 14, 1986, with attached chart..... J.A. 86

Allied NFPA Meeting Expense Chart, filed as Plaintiff's Exhibit 577 in the District Court on October 14, 1986 ..... J.A. 91

The following opinions have been omitted in printing the Joint Appendix because they appear in the Appendix to the Petition for a Writ of Certiorari:

PET. APP. PAGE

Opinion of the Court of Appeals; April 22, 1987 ..... 1a

Opinion of the District Court; June 27, 1985..... 23a

Relevant Docket Entries in District Court

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

81 Civ. 6250

INDIAN HEAD, INC.,
Plaintiff,

—v.—

ALLIED TUBE & CONDUIT CORPORATION,
Defendant.

Date	
October 9, 1981	Plaintiff Complaint
January 19, 1982	Defendant Allied Tube & Conduit Answer to the Complaint
April 26, 1985	. . . Trial concluded April 25, 1985, total trial days: 29, jury verdict for plaintiff in the amount of $3,800,000, decision reserved on defendant's motion for judgment notwithstanding the verdict
June 10, 1985	Filed order *nunc pro tunc*
July 31, 1986	Filed order granting defendant's motion for judgment notwithstanding the verdict and denying motion for new trial
August 6, 1986	Filed judgment entering judgment notwithstanding the verdict

September 2, 1986	Plaintiff Notice of Appeal from judgment notwithstanding the verdict
September 5, 1986	Defendant Notice of Cross-Appeal from Judgment denying motion for new trial
October 14, 1986	Filed Stipulation re: Exhibits

Relevant Docket Entries in Court of Appeals

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

86 Civ. 7734

INDIAN HEAD, INC.,

Plaintiff-Appellant,
Cross-Appellee,

—v.—

ALLIED TUBE & CONDUIT CORPORATION,

Defendant-Appellee,
Cross-Appellant.

Date	
April 22, 1987	Judgment notwithstanding verdict vacated and remanded with directions to reinstate the jury's Award
May 5, 1987	Order that Kramer, Levin, Nessen, Kamin & Frankel be substituted as attorneys of record for Defendant-Appellee, Cross-Appellant Allied Tube & Conduit Corporation
May 6, 1987	Allied Tube & Conduit Corporation petition for rehearing and suggestion for rehearing *en banc*
June 11, 1987	Order denying petition for rehearing and suggestion for rehearing *en banc*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 81 Civ. 6250 (PNL)

INDIAN HEAD INC.,

Plaintiff,

—v.—

ALLIED TUBE & CONDUIT CORPORATION and
NATIONAL FIRE PROTECTION ASSOCIATION,

Defendants.

COMPLAINT

Plaintiff Indian Head Inc., by its attorneys, brings this action against the defendants and complains as follows:

JURISDICTION AND VENUE

1. Jurisdiction is based upon 28 U.S.C. § 1337, this being a civil action arising under sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, for damages and injunctive relief for violation of section 1 of the Sherman Act, 15 U.S.C. § 1.

2. Venue is proper under sections 4 and 12 of the Clayton Act, 15 U.S.C. §§ 15, 22, all defendants being found or transacting business in this district.

PARTIES

3. Plaintiff Indian Head Inc. is a Delaware corporation and has its principal place of business in New York. Carlon is a division of Indian Head Inc. The Carlon Division (hereinafter "Carlon") manufactures and sells electrical non-metallic tubing, as hereinafter defined.

4. Defendant Allied Tube & Conduit Corporation (hereinafter "Allied") is a Delaware corporation and has its principal place of business in Illinois. Allied manufactures and sells electrical tubing, as hereinafter defined.

5. Defendant National Fire Protection Association (hereinafter "NFPA") is a Massachusetts corporation and has its principal place of business in Massachusetts. NFPA develops, publishes and disseminates recommended standards relating to fire prevention and safety. As more fully explained below, one such set of standards regularly promulgated by NFPA is the National Electrical Code.

NATURE OF INTERSTATE TRADE AND COMMERCE AFFECTED

6. The interstate trade and commerce which is the subject of this action and which is affected by the unlawful acts described herein is the manufacture and sale in the United States of tubing for use in above-ground electrical wiring in buildings (hereinafter "electrical tubing"). Carlon and defendant Allied sell electrical tubing in interstate commerce. Defendant NFPA also transacts business in interstate commerce.

7. Electrical tubing is used to contain and protect electrical wiring of various types, such as the wires which run throughout a building to supply electric power to overhead lights and wall outlets. Electrical tubing is available in various diameters depending on the size and quantity of electrical wiring required between any two points.

8. Most electrical tubing is sold by manufacturers, including defendant Allied, through sales agents or manufacturers' representatives who, on behalf of the manufacturers, solicit orders from distributors on a commission basis. The distributors, in turn, sell to electrical and construction contractors who install the tubing in conformance with applicable laws and electrical code requirements.

9. Traditionally, electrical tubing has been made of steel (hereinafter "steel tubing"). Defendant Allied manufactures and sells steel tubing.

10. Electrical tubing made of polyvinyl chloride, a plastic material (hereinafter "non-metallic tubing"), is the most recent generation of electrical tubing. Plaintiff Indian Head Inc., through Carlon, recently developed, and now manufactures and sells such tubing. Non-metallic tubing offers many advantages over steel tubing. Compared to steel tubing, non-metallic tubing is lighter in weight, easier to cut and is less likely to cause damage to wiring during installation. Moreover, Carlon's non-metallic tubing is corrugated—a very important feature which allows the installer to bend the tubing by hand, which cannot be done with steel tubing. As a result of the foregoing features, non-metallic tubing requires less installation time and is lower in over-all installed cost than steel tubing. In addition, unlike steel tubing, non-metallic tubing is virtually impervious to corrosion, and because it is non-conductive, it cannot become electrically energized or cause a short circuit if the conductors are damaged.

DESCRIPTION OF ANTICOMPETITIVE ACTS AND EFFECTS

11. Defendants have, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, unlawfully combined and conspired in unreasonable restraint of trade in the manufacture and sale of electrical tubing for use in above-ground electrical wiring in buildings.

12. Pursuant to this combination and conspiracy, defendants have unlawfully combined and conspired among themselves, and with other co-conspirators, to deny approval to non-metallic tubing in defendant NFPA's 1981 National Electrical Code (hereinafter "NEC"). By denying NEC approval to non-metallic tubing, defendants have effectuated a concerted boycott to exclude non-metallic tubing as a product competitive with steel tubing. As a result of the combination and

conspiracy, Carlon has been precluded from selling non-metallic tubing in almost the entire United States, and users of electrical tubing have been denied the advantages, including the cost-savings, of this product.

13. Defendant NFPA has sponsored the NEC since 1911. It has promulgated a revised edition of that Code every three years. The NEC prescribes standards for the safe design and use of electric conductors and equipment. As promulgated by defendant NFPA, a private corporation, the NEC is advisory and does not carry the force of law. However, the NEC has been widely adopted as a comprehensive, mandatory safety standard by governmental bodies exercising legal jurisdiction over electrical installations. Approximately 37 states have adopted the NEC in whole or in substantial part as their statewide electrical code. In those states which do not have statewide codes, the NEC has been wholly or substantially adopted by many of the larger municipalities. Thus, as a practical matter, any new product within the purview of the NEC must carry its approval in order effectively to compete and be sold in most parts of the nation.

14. The procedures followed by defendant NFPA for the promulgation of the 1981 NEC were essentially as follows:

Following the publication of the 1978 NEC, parties proposing additions or amendments to the NEC, for inclusion in the NEC to be promulgated three years later in 1981, submitted their proposals to the NFPA, which referred the proposals to its NEC Correlating Committee. The Correlating Committee assigned each proposal to the appropriate NFPA Code-Making Panel (hereinafter "CMP"). These CMP's are, in effect, committees of defendant NFPA to whom responsibility is delegated to determine the technical merits of each such proposal and recommend whether the proposal should be incorporated into the next NEC. There are currently 23 CMP's, each with expertise in a different technical area. Each CMP is responsible for evaluation of proposed articles and amendments in its respective field. The CMP's issued their final reports concern-

ing the 1981 NEC in early 1980. The reports were then processed by the NEC Correlating Committee, which published them several months prior to the 1980 NFPA Annual Meeting. The reports were then voted on by the membership at the 1980 NFPA Annual Meeting held in May, 1980. Those proposals approved at that meeting were thereafter incorporated into the 1981 NEC.

15. In September of 1978, Carlon began the procedure for obtaining approval of its non-metallic tubing in the 1981 NEC by submitting to defendant NFPA a proposed Code article designated as Article 331.

16. Carlon's proposed Article 331 was assigned to Code Making Panel No. 8 (hereinafter "CMP-8"), the Panel responsible for and with expertise in electrical tubing. From November, 1978 to December, 1979, Carlon provided various test reports and data to CMP-8, made presentations to it, and arranged several installation demonstrations of non-metallic tubing in various locations around the country to demonstrate the product to CMP-8 members. While CMP-8 initially did not accept Article 331, after it reviewed all the data, at its final meeting in December, 1979 concerning proposed provisions of the 1981 NEC, CMP-8 approved Article 331 by a vote of 11 to 4.

17. Beginning at least as early as the approval of non-metallic tubing by CMP-8, defendants, together with their co-conspirators, including the American Iron and Steel Institute, Republic Steel Corp., Triangle PWC, Inc., Western Tube Conduit and Corporation, Wheatland Tube Company, Inc., and others with a financial interest in excluding non-metallic tubing as a competitive product to steel tubing (hereinafter collectively "the steel group"), and other persons, combined and conspired to prevent competition from non-metallic tubing by excluding it from the 1981 NEC and future editions of the NEC.

18. In furtherance of the combination and conspiracy, defendants and the co-conspirators, including the steel group, brought about the rejection of Article 331 at the NFPA Annual Meeting on May 20, 1980, in Boston, Massachusetts by engaging in the following activities, among others, in furtherance of their combination and conspiracy to accomplish the anticompetitive purpose:

(a) Defendant Allied and its co-conspirators procured their employees, sales agents and others to become new members of defendant NFPA. Under then-current NFPA rules, anyone—a company or an individual—who became a member of NFPA within 30 days prior to the Annual Meeting could vote on all NEC proposals, including Article 331 covering non-metallic tubing.

(b) Defendant Allied and its co-conspirators paid or reimbursed, directly or indirectly, the NFPA dues of the new members.

(c) Defendant Allied and its co-conspirators arranged for those new members to be present at the NFPA Annual Meeting, and paid or reimbursed, directly or indirectly, expenses for travel, meals and lodging, and registrations at the meeting.

(d) Defendant Allied combined and conspired with its co-conspirators, including the steel group, the aforementioned new members that had been procured and with defendant NFPA, to engage in bloc voting against Article 331 at the NFPA Annual Meeting, without regard to the Article's technical merits.

19. In furtherance of the above-described combination and conspiracy, many people procured by defendant Allied and by the steel group attended the NFPA 1980 Annual Meeting for the purpose of voting as a bloc against Article 331 to prevent Carlon from introducing non-metallic tubing in competition with steel tubing. As a result of these many last-minute negative votes procured by defendant Allied and its co-conspirators, including the steel group, and accepted as valid votes by defendant NFPA, the 390 votes cast in favor of

Article 331 were insufficient to pass it, and the Article failed to win approval by the margin of 394 to 390. But for defendants' unlawful acts, and the arbitrary and capricious vote that they produced, Article 331 would have been approved for inclusion in the NEC by a large marjority.

20. Defendants further combined and conspired to prevent an accurate count of the vote, more than 90% of which was counted by means of people standing at their seats. The imprecise method of counting, the difficulty in determining whether those who were voting were in fact entitled to vote, the number of people in the auditorium and the conditions present at the time of the vote, including the movement of people in the auditorium, made it impossible to obtain an accurate count of the vote. In view of the foregoing and the minute margin, proponents of Article 331 sought either a recount or reconsideration. For example, Mr. Chester Schirmer, NFPA Second Vice Chairman and a member of the NFPA Board of Directors, stated:

> "It's a pretty close vote. I frankly feel that what is going on here is blatantly apparent to anyone in the room who has eyes, ears, and a nose. I, therefore, call for a recount."

Requests for a recount or reconsideration were denied by defendant NFPA.

21. Carlon appealed the vote within NFPA. The Board of Directors of defendant NFPA ignored the unfairness of the vote and denied Carlon's appeal.

22. Defendant NFPA had recognized before the rejection of Article 331 in May 1980 that, under its then existing rules and procedures, interests such as defendant Allied and the co-conspirators could combine and conspire to subvert defendant NFPA's consensual standards rules and procedures and thus prevent inclusion of a competitive product in the NEC. Nonetheless, defendant NFPA failed to modify its rules and procedures and participated in the above-described combination and

conspiracy which resulted in the exclusion of Article 331 from the 1981 NEC. Following the rejection of Article 331, defendant NFPA publicly acknowledged the inadequacy and potential for abuse and subversion of its rules and procedures, and also of the actual abuse and subversion of those rules and procedures, which resulted in the rejection of Article 331 at defendant NFPA's 1980 Annual Meeting. As announced in the December 1980 issue of "Fire News," the NFPA official newsletter:

> "In 1979, the NFPA Board of Directors established a subcommittee to study the issues of procedural requirements for standards adoption. Subsequent obvious 'block voting' at the 1980 annual meeting, and the negative reactions from a large section of the membership to such voting, reinforce the necessity for Board action on the situation."

Only after the rejection of Article 331 in May 1980 did the NFPA Board adopt several reforms which were direct responses to the unlawful methods used to prevent adoption of that Article:

(1) A membership vote against a proposed Code article would no longer be dispositive. If an article approved by the appropriate CMP and by the Correlating Committee were rejected by the membership at the Annual Meeting, the article would then go to the NFPA Standards Council for a decision on issuing the article.

(2) Voting at Annual Meetings would be restricted to those who had been members for 180 days, rather than only 30 days as had been permitted for voting at the 1980 Annual Meeting, when Article 331 was rejected.

23. Because defendants' combination and conspiracy had excluded non-metallic tubing from the 1981 NEC, Carlon sought a Temporary Interim Amendment (hereinafter "TIA") to the NEC. A TIA is an NFPA procedure whereby, under certain circumstances, new provisions can be added to the NEC prior to the next regularly scheduled triennial revision of

the NEC, which in this case would not be until 1984. To obtain a TIA, a three-quarters vote of the appropriate CMP is required initially, as distinguished from the simple majority required for approval for inclusion in the regularly promulgated triennial NEC.

24. Carlon's proposed TIA was also designated as Article 331, and was similar to the prior proposed Article 331, except that it provided for the use of other non-metallic materials in addition to PVC, if any proved suitable in the future. On June 30, 1980, as required under NFPA rules to begin processing of the TIA, a member of NFPA's CMP-8 registered his official endorsement of Article 331.

25. During the fall of 1980, Carlon made available further technical data concerning non-metallic tubing, both to the members of CMP-8 and to members of the public who were in a position to submit comments to that panel. Numerous comments by technically informed persons were filed in favor of the TIA sought by Carlon. Defendant Allied and its co-conspirators, including the steel group, meanwhile continued their combination and conspiracy to keep non-metallic tubing out of the market and procured comments against the TIA from many of the same persons whose votes they had procured at the May 1980 Annual Meeting. As Pete Schram, an NFPA staff member and Secretary to the Correlating Committee, stated in a memorandum transmitting some of those comments to CMP-8:

> "Attached hereto is a series of comments that are non-technical.
>
> "Our records reflect that this point of view [the opposition to Article 331] was represented at the Annual Meeting by Allied Tube and Conduit Corporation and by its employees and suppliers and is again being presented by these same individuals whose registrations at the Annual Meeting were provided by Allied Tube and Conduit Corporation."

26. On February 1, 1981, after considering the comments upon and the merits of non-metallic tubing, CMP-8 approved the TIA for Article 331 by a vote of 13 to 2. One of the only two dissenting votes to approval of Carlon's proposed Article 331 was cast by the representative of the co-conspirator American Iron & Steel Institute.

27. Shortly thereafter, defendant Allied and co-conspirator American Iron & Steel Institute moved to appeal the decision of CMP-8 to the NFPA Standards Council. That appeal was heard on April 1, 1981. The NFPA Standards Council also approved Carlon's proposed Article 331.

28. Defendant Allied and co-conspirator American Iron & Steel Institute appealed that decision to the NFPA Board of Directors. On May 27, 1981, the Board named a subcommittee of five members to consider the appeal, and scheduled it to be heard on June 17, 1981.

29. When representatives of Carlon appeared to argue the appeal, they learned for the first time that two members of the five-member subcommittee had been changed as a result of purported objections by defendant Allied, and that one other member of the subcommittee would not participate in the appeal. These substitutions, and the reduction in the size of the subcommittee to four members, were made without Carlon's advance knowledge or consent and denied it a reasonable opportunity to object to the change in membership and size of the subcommittee or to the designated replacements, and thus denied it a fair hearing. On June 22, 1981, Carlon was advised that the subcommittee had sustained the appeal of defendant Allied and co-conspirator American Iron & Steel Institute and determined not to issue the proposed TIA, thereby overturning the determination of both CMP-8 and the NFPA Standards Council.

30. By the above described combination and conspiracy, defendants engaged in a fundamentally unfair abuse and twisting of the NFPA consensual standards procedure for an anti-competitive purpose. Because of the adoption and application

of the NEC by states and municipalities as described in paragraph 13 above, the combination and conspiracy had and continues to have the following unlawful effects, among others:

(a) Carlon has been almost wholly excluded from selling non-metallic tubing in competition with steel tubing manufactured by defendant Allied and others of the co-conspirators.

(b) The distributors and contractors who would purchase and use non-metallic tubing have been subject to what is effectively a boycott of non-metallic tubing, which boycott was the purpose and result of defendants' combination and conspiracy.

(c) Contractors and owners and tenants of buildings have been denied the opportunity to benefit from the competition of non-metallic tubing with steel tubing, thereby maintaining and increasing the price of steel tubing.

31. As a result of the foregoing combination and conspiracy, and acts of defendants in furtherance thereof, Carlon has sustained injury to its business and property in an amount not yet ascertainable, but which will be measurable prior to trial.

32. The combination and conspiracy threatens Carlon with further loss and damage, because unless permanently enjoined, defendants will continue to prevent Carlon from obtaining a TIA to the 1981 NEC, and will prevent inclusion of an article permitting use of non-metallic tubing in the 1984 Code and subsequent Codes. Carlon has no adequate remedy at law.

WHEREFORE, Carlon prays for judgment:

1. Declaring that defendants have violated Section 1 of the Sherman Act, 15 U.S.C. § 1;

2. Awarding Carlon treble the damages sustained by it as a proximate result of the violations described in this Complaint, including costs and reasonable attorney's fees;

3. Permanently enjoining and restraining defendants from engaging in the violations described in this Complaint; and

4. Granting such other and further relief as this Court deems just and proper.

Dated: October 9, 1981

KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER

By /s/ JOSHUA F. GREENBERG
A member of the Firm

425 Park Avenue
New York, New York 10022
(212) 407-8000

Of Counsel:

JOSHUA F. GREENBERG
FREDRIC W. YERMAN
RICHARD A. STRASSMAN

TRAMMELL E. VICKERY, ESQ.
Hansel, Post, Brandon
& Dorsey
First National Bank Tower
Atlanta, Georgia 30383
(404) 581-8000

RICHARD J. CUTLER, ESQ.
Indian Head Inc.
1211 Avenue of the Americas
New York, New York 10036
(212) 764-3257

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Index No. 81 Civ. 6250

INDIAN HEAD, INC.,

Plaintiff,

—against—

ALLIED TUBE & CONDUIT CORPORATION and
NATIONAL FIRE PROTECTION ASSOCIATION,

Defendants.

ANSWER

Defendant Allied Tube & Conduit Corporation (hereinafter "Allied"), by its attorneys, Grand & Ostrow and Barrett, Hanna, Daly & Gasper, for its answer to the Complaint, herein:

1. Denies the allegations contained in paragraph 1 of the Complaint, except admits that plaintiff seeks to assert a claim and purports to invoke the jurisdiction of this Court as set forth therein.

2. Denies the allegations contained in paragraph 2 of the Complaint.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the Complaint.

4. Admits the allegations in paragraph 4 of the Complaint, except denies that the Complaint accurately defines the products manufactured and sold by Allied.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 of the Complaint, except admits the last two sentences of that paragraph.

6. Denies the allegations contained in paragraph 6 of the Complaint, except admits that it sells various products in interstate commerce, and denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in the last sentence of that paragraph.

7. Denies the allegations contained in paragraph 7 of the Complaint.

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the Complaint, except denies the allegations insofar as they purport to include or refer to Allied.

9. Denies the allegations contained in paragraph 9 of the Complaint, except admits that it sells various steel tubing and conduit products.

10. Denies the allegations contained in paragraphs 10, 11 and 12 of the Complaint.

11. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 13, 14, 15 and 16 of the Complaint.

12. Denies the allegations contained in paragraphs 17, 18, 19, 20 and 21 of the Complaint.

13. Denies the allegations contained in paragraph 22 of the Complaint, except denies knowledge or information sufficient to form a belief as to the truth of the allegations in that paragraph which purport to refer to defendant NFPA.

14. Denies the allegations contained in paragraph 23 of the Complaint, except denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in the last two sentences of that paragraph.

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 24 of the Complaint.

16. Denies the allegations contained in paragraph 25 of the Complaint.

17. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 26 of the Complaint, except denies the allegations in that paragraph insofar as they purport to allege a violation by Allied of the antitrust laws.

18. Admits the allegations contained in paragraphs 27 and 28 of the Complaint, except denies the allegations in those paragraphs insofar as they purport to allege a violation by Allied of the antitrust laws.

19. Denies the allegations contained in paragraphs 29, 30, 31 and 32 of the Complaint.

FIRST AFFIRMATIVE DEFENSE

20. The safety of the products manufactured and sold within the electrical industry is in large part regulated by voluntarily developed safety standards such as the National Electrical Code ("NEC"). It is the moral and legal responsibility of each manufacturer within that industry, in the development of such "voluntary safety standards," to address in the public forum and within the applicable organization the issue of whether products offered for sale to the public present a safety hazard.

21. It is only in recent years that the toxic effects on fire victims of gases from smoldering or burning plastics has been studied in any depth by the independent scientific community. In addition, there are now under way a number of programs

and studies which will make available even more specific information on the subject.

22. The information already available on the subject indicates that plastic commonly used in construction such as PVC electrical tubing and conduit creates serious hazards to people in fires.

23. In its activities relating to the NEC, Allied sought to make certain that the NFPA considered this issue of toxicity in connection with Article 331 as well other provisions of the NEC which permit the use of a variety of combustible materials.

24. It has been Allied's consistent position in its activities relating to the NEC, that until the current studies on toxicity are completed and the toxicity of all materials is fully considered and meaningfully addressed, the NFPA should not approve the use of additional PVC products.

25. All of Allied's actions and statements respecting its efforts regarding the 1981 NEC were based on a good faith, well founded belief that PVC products in fact constitute an inherent, immediate and substantial danger to the public.

SECOND AFFIRMATIVE DEFENSE

26. All actions taken by Allied with respect to the NEC and the proposed Article 331 constituted valid lobbying activity designed to influence a governmental or quasi-governmental body, which activity is, under the *Noerr-Pennington* doctrine, exempt from the federal antitrust laws.

THIRD AFFIRMATIVE DEFENSE

27. Section 1 of the Sherman Act, 15 U.S.C. § 1 is, as interpreted by plaintiff, violative of the First and Fourteenth Amendments of the Constitution of the United States.

FOURTH AFFIRMATIVE DEFENSE

28. All actions taken by Allied with respect to plaintiff's proposal to add Article 331 to the 1981 National Electrical Code were in accordance with the by-laws of the NFPA and the regulations governing committee projects and conformed to the standards and procedures established by the NFPA and its Board of Directors.

FIFTH AFFIRMATIVE DEFENSE

29. Upon information and belief, plaintiff, in attempting to obtain approval of Article 331, engaged in fundamentally unfair and deceptive activities designed to distort the NFPA's decision making process and to circumvent the NFPA's objective standards which must be met before a proposal can be incorporated into the NEC.

30. Upon information and belief the various tests, reports and data allegedly submitted by plaintiff to the NFPA and its committee and members and the various presentations and demonstrations made by plaintiff to the defendant NFPA and its committees and members were, with the full knowledge of plaintiff, inaccurate, incomplete and invalid.

31. Accordingly, plaintiff's claims are barred under the doctrines of *in pari delicto* and unclean hands.

SIXTH AFFIRMATIVE DEFENSE

32. To the extent that the facts and claims alleged by the plaintiff in the Complaint occurred at all, upon information and belief, plaintiff engaged in the same or similar conduct in connection with its efforts to obtain approval of Article 331. Accordingly, plaintiff's claims are barred under the doctrines of *in pari delicto* and unclean hands.

SEVENTH AFFIRMATIVE DEFENSE

33. To the extent that the facts and claims alleged by plaintiff in the Complaint occurred at all, they occurred with the full knowledge and consent of plaintiff.

34. Accordingly, plaintiff has waived its right to assert and is estopped from asserting any of the claims set forth in the Complaint.

EIGHTH AFFIRMATIVE DEFENSE

35. Plaintiff did not suffer damage in fact or injury to its business or property from any alleged conspiracy. Therefore plaintiff lacks standing to bring this action.

NINTH AFFIRMATIVE DEFENSE

36. The claims alleged in the Complaint are barred in whole or in part by laches or the applicable statute of limitations.

TENTH AFFIRMATIVE DEFENSE

37. Defendant Allied is not liable to plaintiff for the acts alleged in the Complaint because those acts are not the proximate cause of any injury to plaintiff.

ELEVENTH AFFIRMATIVE DEFENSE

38. The Complaint fails to state a claim upon which relief can be granted.

WHEREFORE, defendant Allied requests judgment dismissing the Complaint herein with prejudice, granting it its costs and expenses (including attorneys fees) incurred in this action, and for such other and further relief as the court may deem just in the circumstances.

Dated: New York, New York
January 18, 1982

GRAND & OSTROW

By /s/ [ILLEGIBLE]
A Member of the Firm
641 Lexington Avenue
New York, N.Y. 10022
212-832-3611

and

BARRETT, HANNA, DALY & GASPAR
2550 M Street, N.W.
Washington, D.C. 20037
202-293-3204

Attorneys for Defendant Allied Tube & Conduit Corporation

Question No. 1

Did Allied have a genuine belief as of May 1980 that electrical nonmetallic tubing ("ENMT") was unsafe?

Yes ✓ No ____

[Answer this question only if the answer to Question No. 1 is NO.]

Would it have been material to those attending and voting at the May 1980 NFPA meeting to have known that Allied did not genuinely believe that electrical nonmetallic tubing ("ENMT") was unsafe?

Yes ____ No ____

[Answer this question only if the answer to Question No. 1 is NO.]

Would it have been material to the NFPA Standards Council and to the NFPA Board of Directors to have known that Allied did not genuinely believe that electrical nonmetallic tubing ("ENMT") was unsafe?

Yes ____ No ____

Question No. 2

[Answer this question only if the answer to Question No. 1 is yes.]

In opposing Article 331 in May 1980, did Allied act, at least in part, based upon a genuine belief that ENMT was unsafe?

Yes ✓ No ____

Question No. 3

Was Allied genuinely attempting to influence the NFPA in opposing Article 331?

Yes ____ No ____

Question No. 4

Did Allied's conduct violate any of the rules or regulations of the NFPA??

Yes ____ No ✓

Question No. 5

Regardless of whether Allied's conduct violated any of the rules or regulations of the NFPA, did Allied's conduct subvert the consensus standard making process of the NFPA?

Yes ✓ No ____

Question No. 6

Under the NFPA rules and regulations in effect as of May 1980, did the vote of the membership at the annual meeting effectively determine whether Article 331 would be excluded from the NEC?

Yes ____ No ✓

Question No. 7

Were the NFPA rules and regulations fair in that they provided a full and effective appeal from the vote of the membership?

Yes ✓ No ____

Question No. 8

Did Allied's conduct deprive Carlon of full and effective access to the NFPA?

Yes ____ No ✓

Question No. 9

Was Allied's conduct a substantial or material factor in excluding Article 331 from the 1981 NEC?

Yes ✓ No ____

Question No. 10

Did Allied's opposition at the May 1980 NFPA meeting constitute the least restrictive means of effectively expressing Allied's opposition to the use of ENMT in the marketplace?

Yes ____ No ✓

Question No. 11

Did Allied's conduct in opposing Article 331 adversely impact competition?

Yes ✓ No ____

Question No. 12

Does Allied's conduct consitute an unreasonable restraint of trade in violation of the antitrust laws?

Yes ✓ No ____

/s/ [ILLEGIBLE]
4/9/85

[3258] for the last seven weeks.

THE COURT: All right, members of the jury, would you prefer that I go right into my instructions or would you like a short recess first? The instructions should not be terribly long, but if you want us to go into it now, I will.

(Pause)

THE COURT: I don't propose to repeat to you everything I told you about two weeks ago about the question on how you assess the credibility of witnesses and all the rest of that, I think I told you in great detail what factors you use, and I think those considerations are equally relevant to this phase of the trial, so everything I told you about credibility of witnesses and how you assess credibility, et cetera, and all of the other general instructions that I gave you I tell you now are fully applicable to this phase of the trial and, therefore, you should use those yardsticks.

I have given you what amounts to a special instruction earlier in the day with respect to the question of alleged treble damages insofar as it may affect the credibility or interest of any witnesses who testified about that phase of the trial and I think I have fully covered that, I don't think there is any need for me to repeat that charge to you.

I also tell you that the instructions that I **[3259]** gave you with respect to expert testimony, I think I made it very plain to you at the first phase of the trial, which is the liability phase of the trial, that the credibility of an expert witness is to be tested in the same way—is to be assessed in the same way that any other witness' credibility is assessed. You consider the same factors. You consider the interest factor.

And, of course, these experts who have testified on both sides here you have heard were paid for their time and their services and paid rather substantial amounts, so that is a fact you may consider in assessing the credibility of those witnesses. Their credibility, like any other witness, is for you to determine, and it is up to you to decide whether or not you believe

them or whether or not you accept the credibility of what they say.

I also told you at the first phase of the trial, of course, that the jury does not have to accept the testimony of any expert, that's a jury function. The jury assesses the expert's testimony and decides whether or not the reasons advanced for the expert opinion are sound in the mind of the jury.

I never like a jury to believe that they must be compelled to accept any expert's testimony because he is an expert. First, of course, there is the credibility question which I referred to and, second of all, you may **[3260]** not agree with the basis for the opinion he gives and you have to decide whether or not that opinion is sound or unsound.

We have had a series of experts testify at the damage phase of this trial and I think you can understand that both sides have made their arguments about whether or not the predicate for their opinions makes any sense in your mind.

You have heard arguments on the one side that they are speculative and not reasonable and you have heard arguments on the other side that the defendant's experts didn't know what they were doing. It is fairly within the jury's function to decide those questions.

So you assess the credibility of the experts, you assess the basis for their opinion and you decide whether or not the opinions you have heard are based upon a reasonable assessment of the facts and circumstances of the case. That is a proper jury function.

Now a word about damages. I think I have told you earlier in the case that the plaintiff is entitled to recover what amounts to compensatory damages only from the jury. Therefore, under the antitrust laws, that means a damage for a business injury suffered as a result of the alleged wrongful conduct of the defendant, and that has two parts, of course. The plaintiff must prove damages to his **[3261]** business as a result of the defendant's conduct and, of course, the second part of that is it must be the result of the defendant's conduct. It must have been caused by the defendant's conduct.

And I have instructed you on the question of proximate cause earlier in the trial. Suffice it to say, of course, as I have told you before, that under the law the defendant's conduct need not be the sole cause of the plaintiff's injury, but it must be a cause. It may operate in connection with other factors, but it must be a cause.

And when you deal with the quantification of plaintiff's damages, of course, the only damages the plaintiff is entitled to recover are those which result from the defendant's conduct, and I will say a little more about that in a second, but I want you to understand that that's what we are dealing with.

Now, it is not required under the law that the plaintiff prove his damages with mathematical certainty, but the plaintiff does have the burden of proving that he suffered a damage as a result of the defendant's conduct.

Now, I have given you instructions with respect to the preponderance of the evidence. Those instructions are equally applicable here. I have told you what preponderance is, I have told you and I will repeat it just briefly for you now, that preponderance does not mean the **[3262]** number of witnesses called so that you don't weigh numbers only, you look at the quality of the evidence.

And I have told you the party having the burden of proof has the burden of tipping the balance, as I have told you with that scale of justice, even slightly in his favor, but it must be tipped. If the scales are at equilibrium or tip in favor of the defendant, then, of course, the verdict must be against the party having the burden of proof, and the plaintiff, of course, has the burden of proof with respect to damages.

As I have told you, the plaintiff does not have to prove that his damages are established with mathematical precision or certainty, it is sufficient if he proves under the law in an approxiate amount what his damages are as a result of defendant's conduct.

Now, in a case such as this where a product has been excluded from the market, of course, to some extent there is a certain reconstruction process that must take place, because we don't know what would have happened had the product not

been approved—not been excluded, rather, from the code in 1980, so, therefore, in a case such as this where the plaintiff claims the defendant's conduct causes exclusion, of course, to some extent the defendant's conduct has made the quantification of exact damages difficult, so, therefore, the law is that it is sufficient **[3263]** if the plaintiff proves his damages to a reasonable approxirmation and, of course, the plaintiff does have the burden of proving a reasonable basis for the damages that the plaintiff claims.

So while the plaintiff need not prove his danages with mathematical exactitude, he must provide the jury with a reasonable basis on which to infer that the damages which he seeks are based upon the evidence in the case and a reasonable basis for claiming those damages. That is the plaintiff's burden and I think no one disputes that.

As part of that I should also tell you, of course, however, that the plaintiff may not prove his damages as a matter of speculation or conjecture or guesswork. There must be a reasonable basis for the damages that the plaintiff claimants. Plaintiff is not entitled to prove his damages by what amounts to speculation or conjecture.

Now, in the context of this case, of course, you may recall during the course of the trial we had some colloquy about the three story limitation and I think the plaintiff indicated to you at that time that they were withdrawing their claim for a damage calculation on the assumption that the three story limitation would not have been in existence from 1980 to 1984, from 1981 to 1984, so **[3264]** the only damage calculations which you are being asked to consider are those cases which you have seen on oral argument, here on closing argument which are predicated upon the assumption that the product would have been approved in the 1981 code with the three story limitation intact, so that's the only damages you are being asked to compute. The plaintiff is not seeking any damages based upon the assumption that between 1981 and 1984 the product would have been approved without the three story limitation.

The plaintiff has indicated to you and I think he has indicated to the Court in response to my question that they are presenting to you several alternative theories of damages, some of which as you have heard go beyond the year 1986, some of which end at the year 1986, but the longest of which I think goes to the year 1989, if I'm not incorrect.

MR. SACKS: That's correct, your Honor.

THE COURT: So there are several theories of damages which plaintiff offers and it is for you to decide whether or not the plaintiff has proved its right to recover, under the standards I have given you, damages on any one of those theories that he has relied upon.

Now, there is, of course, another thing which you have to keep in mind in the context of this case, and that is, of course, that the defendants are arguing here **[3265]** that there are a lot of other conditions out there in the market which impact plaintiff's ability to sell its product other than its defeat at the 1980 meeting, and I think the argument that has been made here—of course, you heard the plaintiff's argument most recently, and the plaintiff's argument is what happened in May 1980 has created a certain stigma on the product which has carried through and that the defendants have attempted to market that stigma in the years which have ensued so that the extent of the damages which it now suffered are as a direct resulted of what happened in 1980, and that is the plaintiff's claim. The plaintiff claims his damages do result from what happened in May 1980 and not from any conduct of the defendants that they were engaged in other than the marketing of that defeat in 1980 in the years that follow. That's the plaintiff's claim.

And, of course, the plaintiff has to prove that, as Mr. Wright told you, that his damages, the damages which he claims he suffered were the result of what happened in May 1980 and the defendant's efforts to market that.

Now, the defendant argues, of course, that the plaintiff's inability to sell the product result from a lot of other causes in the marketplace, such as plaintiff was not ready to proceed on

time in 1980 in any event, they lacked the proper management controls, their projections **[3266]** were unrealistic. There are a whole series of arguments the defendant makes in that regard. They argue that there was a genuine concern for safety and a legitimate safety question out there in the marketplace which impacted the plaintiff's sales in that regard. And, of course, these are factors you may properly consider.

The plaintiff does not seek damages resulting from any of the defendant's conduct other than its conduct at the May 1980 meeting and its marketing of that defeat in the marketplace.

To the extent that the defendant has sought to bring to the public's attention safety questions, to the extent the defendant has sought to legislate—to lobby before legislative bodies or political bodies with respect to the safety question, the plaintiff does not claim any damages from that conduct, and such conduct may not be a proper predicate for you to assess any damages because that type of conduct would be protected and is not a violation of the antitrust laws. The defendants are entitled to take whatever measures they want to take to inform the public or the political bodies involved of their concerns about the safety issues and the plaintiffs do not seek any damages as a result of that conduct.

So the ultimate test for you to decide is, did the plaintiff's damages or do the damages of the plaintiff **[3267]** which they claim they suffered result from what happened in 1980 and the defendant's efforts since 1980 to rely upon that or utilize that factor in the marketplace. Those damages are properly recoverable and you may properly consider that testimony for that purpose.

You should understand that the purpose of awarding damages in any civil action, of course, is to put the plaintiff in as good a position as he could be placed as if the unlawful conduct had not occurred, and that's the purpose of compensatory damages.

I have told you before and I repeat again, you are not to concern yourselves with punishing the defendant. Punitive damages are not a proper item for the jury to be concerned with. The only damages which the antitrust laws permit are

compensatory damages which are those designed to make the plaintiff whole, to put them in as good a position as they would be if the defendant had not committed the violations of law which the plaintiffs say they committed.

You should understand in arriving at your damage computations or in arriving at a figure with respect to damages, first of all, the fact that I instruct you on damages should not be taken as any indication on my part that you should find any damages whatsoever. It is up to you to decide whether the plaintiff has proved its case and has carried its burden of proof on the damage question.

[3268] So I don't suggest one way or the other how you should find with respect to the damage claim or what amount you should find, but I do tell you that in arriving at that determination, of course, you may not do it by improper means.

I mean, I have told you before what your deliberative process requires as a jury and that you are required to talk to one another and to listen to each other's arguments in that regard and to consider all the evidence in the case and that you are not to compromise your individual judgment improperly, although you are required to—I don't think I have to repeat all that, I have said that to you before and if you want to hear that instruction again I can give it to you, have it read back to you, but I think you remember what I said, that it is your oath as a juror to go into the jury room and to listen to your fellow jurors and to deliberate and to surrender an opinion if you think it's wrong, but if you don't think it's wrong you are not to surrender an opinion because of compromise or any other improper reason.

And in going about the damage calculations, of course, it would be manifestly improper for you to arrive at that number by some form of improper compromise. You have to decide, all six of you must agree as to what the damage calculations are and, therefore, you must do that in **[3269]** the same way in which you resolve all of the questions that were put to you at the liability phase of the trial, through honest debate and open exchange of ideas and a fair attempt to arrive at a unanimous

opinion as to what the damages are or should be in this case, and that's up to you to decide.

You are not to arrive at that number by improper means, such as all of you get together and take a bunch of numbers and average them out. That would be improper. You all have to make a good faith assessment of the numbers. You have to agree upon what the damages are and you cannot do it by compromise or some other improper means.

In deciding what the question of damages are, of course, we are talking about profits, and to the extent that projected sales are relevant to profits, of course, you may consider that sales figure or those projected sales figures as relevant in deciding what the lost profits are, but, of course, the only damage that the law recognizes, of course, is lost profits.

And there may be, of course, lost past profits for the years up to the present time and lost future profits for the years in the future. As I have told you, the plaintiff's calculations include estimates up to the year 1989, some end at the year 1986, so the plaintiff has a claim for past lost profits and a claim for future lost **[3270]** profits, and whether or not they have carried the burden on that is for you to decide.

I will tell you as the plaintiff's counsel did tell you during the course of his closing argument that with respect to any claims for future profits or lost future profits, of course, as you must all be aware, if you get money now, it is worth more than getting money a year from now in the sense that you have the money presently to invest and, therefore, there must be a discount factor with respect to any funds you award now for future profits over the next several years, and the parties have agreed that that discount factor should be five percent for the first year of future profits, which I think is 1986, and if you decide the damages go beyond 1986, that is 1987, of course, that will be five percent times two years, which will be ten percent, and 1988 would be 15 and 1989 would be 20 percent.

I don't think they have to apply a discount factor of more than 20 percent for any future year because that is the last year on any theory of your projections as it goes forward in the future.

MR. SACKS: That's right.

THE COURT: The jury should know the parties have agreed on a discount rate of five percent per year and that has to be multiplied as I have indicated to you.

[3271] Well, I think I have concluded what I intend to say. Unless there are any additions to the charge, I think I covered most of the things you wanted me to tell the jury.

Anything further which you think I should cover?

MR. YERMAN: If I may, your Honor, just to avoid any possible confusion on exactly which damage theories the jury ought to be looking at in terms of the documents, I have written on a piece of paper the exhibit numbers of the three current cases and I can read them or we can even just give this piece of paper to the jury.

THE COURT: I take it—are there three exhibit numbers?

MR. YERMAN: There are three exhibit numbers and one summary number.

THE COURT: I will allow you to read that into the record if you want so the jury will have easier access.

MR. SACKS: In addition to that, it is in the second book, the smaller of the two books.

THE COURT: Both sides I take it have given the jury documents which are relevant to the damages and if you want to identify particularly for the jury what documents you want them to look at, I will let you both do that now.

MR. YERMAN: All right. I am not really trying to focus on particular damage documents, but these are the computation numbers. It was the smaller books headed **[3272]** plaintiff's damage exhibits cross examination and it is the second book that we gave to the jury.

The three cases we are referring to are case number 4, which is PX 528, that is the Carlon case; revised case number 2, which is PX 659, which is the Allied case; and revised case number 5, which is PX 660, the Republic case.

PX 528, PX 659 and PX 660 are the three cases and the summary is PX 661.

THE COURT: All right. I have no objection to giving the jury a list of those exhibits if they want to see them.

Mr. Wright, is there anything you want to tell the jury?

MR. WRIGHT: I think I have said everything I want to say.

THE COURT: All right.

THE COURT: We have a verdict form here.

MR. WRIGHT: They have all the books, if that's the question. I think they have everything in the jury room.

THE COURT: We have a verdict form which asks you to determine what amount of profits did Carlon lose as a proximate result of Allied's unreasonable restraint of trade in violation of the antitrust laws, and that just **[3273]** asks you to quantify the total amount of damages, and that includes damages for lost profits that you find may have occurred and future profits, of course, with a discounting factor which I mentioned.

The parties have asked for one lump figure on that so there is no need to itemize that figure, but as I told you, you arrive at that by a fair evaluation of all the evidence in the case and with due regard to all of the arguments that have been made by both sides on the issues which impact upon the damage calculation.

You have heard the arguments, I don't intend to repeat them. To some extent they really boil down to an argument on Mr. Wright's part that the plaintiff's damages are basically speculative and not reasonably based, and the plaintiff's argument which is that, of course, they are based upon reasonable bases, including what Allied thought would happened. You heard the arguments, I don't have to repeat them. I think the case is ready for you to decide.

If there is nothing further you want me to tell the jury, I will ask them to deliberate and excuse the alternates.

MR. WRIGHT: I have one point for the record.

THE COURT: You can do it here up at the box if you want, if it is done quickly.

MR. WRIGHT: Yes.

What amount of profits did Carlon lose as a proximate result of Allied's unreasonable restraint of trade in violation of the antitrust laws?

$3,800,000.00
Three Million Eight Hundred thousand dollars

Dated: April 25, 1985

/s/ [Illegible]
Foreperson of the Jury

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 6250

New York, N.Y., June 27, 1986, 11:50 a.m.

INDIAN HEAD, INC.,
Plaintiff,

—against—

ALLIED TUBE & CONDUIT CORP., etc.,
Defendant.

Before:

HON. JOHN E. SPRIZZO,
District Judge.

APPEARANCES:

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
Attorneys for Plaintiff

By: Fredric W. Yerman, Esq.
Ira S. Sacks, Esq.

GRAND & OSTROW
Attorneys for Defendant

By: Frank Wright, Esq.
Allison Manning, Esq.

[2] THE COURT: It is your motion, Mr. Wright, so I guess you go first. Why don't you confine yourself to the Noerr-Pennington question, because I have considered all of the other applications in your brief and I am satisfied that none of them have any merit.

With respect to your arguments as to the charge, those are, in my view, not meritorious. Concerning your arguments addressed to the insufficiency or inconsistency of the jury's answers to the questions, I think the jury's answers are not irreconcilable. I think you can subvert the spirit of the NFPA rules and have an effective appeal at the same time. I don't find those arguments to be meritorious.

Address yourself to the Noerr-Pennington question, which I think is the only issue.

MR. WRIGHT: Very good, your Honor.

It seems to me, in reviewing the record in this case and the long history we had as it relates to Noerr-Pennington, the reason we had a trial in this case is because there was a concern, a question, as to whether or not the position we asserted during the course of the 1981 National Electrical Code session was genuine. As your Honor will recall, your Honor described at one point the match point, that every case has a match point. As your Honor described it, the match point in this case was **[3]** whether or not, when we stood up and railed against the safety concerns of that product, we were trying to fool somebody, trying to defraud somebody, because in fact we may have been intending to go in that business ourselves.

Those arguments were made and that long trial was had to resolve that question, in my judgment. The jury found in our favor. The jury found in our favor on all of the factual questions that relate to the Noerr-Pennington defense.

THE COURT: Except for one, which is the jury's finding that you subverted the spirit or the rule or the letter, whatever it was, I forget. I will get the jury question in front of me.

MR. WRIGHT: The jury question, I think, your Honor, was whether or not our conduct at the meeting subverted the—

THE COURT: The consensus-making-standard process.

MR. WRIGHT: We will deal with that, your Honor, because I expected that I would face that.

THE COURT: I don't know that that is more relevant to the rule-of-reason question than Noerr-Pennington, but it may have incidental impact on both.

MR. WRIGHT: As your Honor will recall, during the entire course of this case and even during the course **[4]** of dealing with the jury, it was your Honor's conception that that particular question dealt solely with the question of whether or not our conduct was reasonable or unreasonable. But I will put that aside for a moment. Let me deal first with the legal questions that I think your Honor has to deal with.

The first question is whether or not Noerr-Pennington applies to an organization like the National Fire Protection Association. It has been the plaintiff's consistent position in this case that Noerr-Pennington is limited to direct lobbying activities with a legislature or direct applications to government officials or govermment administrative agencies for relief. It has been our position, and it has been the holding of every court that has considered that question—that is, the extent to which Noerr-Pennington may be applied to private standards-making organizations—that the test that must be applied is to look at a relationship between the activities of the standards-making organization, what they do, and the ultimate legislative effect.

In this case there has never been a dispute that there is a direct, immediate relationship between what the National Fire Protection Association does in promulgating the National Electrical Code and the ultimate legislative effect. That results from the adoption by reference, the **[5]** incorporation by reference, in numerous—numerous—the majority of state and local jurisdictions in this country, of the model code enacted by the National Fire Protection Association.

THE COURT: Their only argument as to that is that you get two cracks at it, because if you lose at the NFPA level, you can still succeed at the legislative level.

MR. WRIGHT: To the extent that is an observation, it is an observation that makes no sense to me, because if Noerr-Pennington protects you during the course of your efforts to affect or influence the legislative process, it makes no sense to me and there is nothing in Noerr, and there is nothing in any of the opinions that ever addressed it, that Noerr is limited to one particular stage in the process.

THE COURT: The only case that comes close to saying it is the Mohammad case out of the Fifth Circuit.

MR. WRIGHT: The Mohammad case, your Honor, really doesn't say that, it really doesn't say that.

THE COURT: It comes close to it in the sense that it suggests that this doctors committee was not a government agency, and the BOME did not have to follow their recommendations. So there is at least an argument that you have to be directly at that level before you are protected by Noerr-Pennington. I don't know that I agree **[6]** with it, but that is what the case seems to say.

MR. WRIGHT: In any event, your Honor, even more pointed than the undisputed relationship between what the NFPA does and the ultimate legislative effect is the theory of their case. The theory of their case has always been that they were injured in the marketplace, that they were barred from introducing this product into the marketplace, not because of what happened at the NFPA meeting but rather because as a result of that meeting local and state jurisdictions adopted pieces of legislation, administrative regulations, which prevented them from selling their product in the marketplace. The obstruction and the restraint to their entry into the marketplace is and always has been legislation, government action.

It is on that basis that Judge Hart in the Wheeling-Pitt case, and indeed every other case that has considered this question, has said in effect that you can't have it both ways. You can't come into federal court and say, "I have been damaged, I am excluded from the marketplace because there are federal and state and local laws that prevent me from selling my product,"

and at the same time say that efforts to influence that process, no matter how indirect, no matter how remote from the ultimate effect, are not covered by Noerr-Pennington. Noerr dealt directly with the question of whether or not indirect **[7]** efforts not directed explicitly at the legislature were covered by the Protection of Noerr. It concerned the extent to which Noerr should be extended to what amounted to an effort to create a groundswell of public opinion. Third-party practices, I think, was the phrase that Justice Black used. He said unequivocally that Noerr has to apply to the process at each stage of the process. In fact, I think it is probably conceded, must be conceded, that the most important stage in the legislative process is the activities at the National Fire Protection Association, as it is at that point—

THE COURT: Their argument is that Noerr protects advocacy, and this is misconduct because you stacked the meetings and all the rest of that.

MR. WRIGHT: That again ignores the realities of the political process. There is nothing in the First Amendment right to petition that limits the petitioner to standing up by himself—by himself—to say his piece. The right to petition, if it means anything, must include the right to organize with people who are of like mind, the right to put together the most powerful voice you can to effect—to effect—the end that you want to achieve.

Voting is the essence of the political process in our country. The cases that they have cited, the O'Brien case and all the cases that deal with the **[8]** limitation of the First Amendment to affect statutes which prohibit certain types of conduct, are not apt here. There are statutes that prohibit discrimination, there are statutes which prohibit draft-card burning. And it is correct that the—

THE COURT: Secondary picketing, that sort of thing.

MR. WRIGHT: Secondary picketing. You can't go before the Court and say, "What I was endeavoring to do when I burned my draft card was express a point of view." And there is an

existing statute which says you cannot do that. That is not what this case is all about. This case concerns the construction of the very statute, the Sherman Act, that is—

THE COURT: You are saying, I take it, their argument is a bit circular in the sense that they start from the assumption that conduct which is otherwise illegal is not protected because it is part of speech, whereas you say the issue to be resolved here is whether the conduct is illegal in the first place.

MR. WRIGHT: Precisely right, your Honor. The issue before the house is whether or not the Sherman Act was intended to apply to this type of activity. I just don't think those cases are apt.

THE COURT: I think there is a circularity in **[9]** their argument, but I will let them address themselves to that.

MR. WRIGHT: There are a number of points that they make in their brief, your Honor. One of them was that Noerr was intended to apply only when, as I indicated before, the lobbying activity is directed specifically at government officials, and they say that since the NFPA is not comprised of government officials, that therefore Noerr does not apply here.

THE COURT: That is an awfully hard argument to sustain in view of the facts of Noerr itself.

MR. WRIGHT: I must say, Judge, that is precisely what I was going to say.

THE COURT: Because in Noerr it was obvious that they were doing a lot of activity directed to other people, other people in the public, etc.

MR. WRIGHT: The other part of the difficulty with that argument, your Honor, is that it would mean that in the context of standards-making organizations the result would be that in fact Noerr cannot apply, because standards-making activities are by definition comprised of industry personnel. That is why they exist. That is the utility of the organizations that they bring to bear—

THE COURT: Somebody cited the Hydrolevel case, and I read that case again last night. I didn't see why it **[10]** has anything to do with anything, because Noerr-Pennington was never raised, as I read the case.

MR. WRIGHT: Beyond the point that Noerr-Pennington was never raised in that case, I have my own view as to why it wasn't raised, and my view is that—

THE COURT: Did any of the parties raise it?

MR. WRIGHT: I don't think so, your Honor. I think what they decided to do in that case, your Honor, as a matter of fact was concede liability and only go to trial on the question of the agency.

THE COURT: Maybe that is what happened, and maybe some lawyers should be sued for malpractice, but I am not so sure that Noerr-Pennington wouldn't apply.

MR. WRIGHT: The organization itself, the individuals who participated in the conduct in question, did not go to trial. They settled, is my recollection of the case. I don't think there is any doubt in that case, since it involved, not the formulation of a standard, but rather what amounted to a fraudulent interpretation of a standard by an individual who had a conflict of interest—

THE COURT: You would probably argue that was closer to an adjudicatory situation and therefore the sham exception has wider berth.

MR. WRIGHT: Absolutely. And if the sham exception has any meaning, it has application in that case **[11]** where what happened is as gross a fraud as anyone could imagine.

THE COURT: Sort of like a judge on the payroll.

MR. WRIGHT: That is exactly what that was. That is precisely what that was.

So I don't think that it is possible, in the context of standards making, to limit the application of Noerr to a situation where only government officials are involved in the

process. You would have to sit down and examine, for example, at what stage during the process government officials may have been involved. In fact, during the course of the voting session there were a lot of government officials there. There is a whole electrical inspectors section in the National Fire Protection Association, all of which participated very actively in that voting session. So there were a number of voting officials there.

THE COURT: Their argument essentially is, as I understand it, that the conduct is so egregious as to take you out of Noerr-Pennington. Even if you might not be out of Noerr-Pennington at the Congressional level itself, you are out of it at the standards-making process, because some lesser standard of misconduct might suffice to take you out of Noerr-Pennington. It is indirect rather than direct. I think that is the argument they are making in their **[12]** briefs.

MR. WRIGHT: To the extent that they have now, it seems to me, said that block voting is sham—

THE COURT: I don't think there is any question that block voting and getting out the vote and lobbying the Congress would certainly not be unprotected conduct at the Congressional level. I don't think anybody can argue that it is part of the legislative process. The argument has to be obliquely that somehow this conduct which would be otherwise tolerable at the Congressional level becomes intolerable or illegal at the standards-making level. I assume that is what the argument has to be.

MR. WRIGHT: My response to that is—and it is kind of a funny response—there is nothing wrong with it. The answer to that is, the plain answer to that is, what happened here cannot rise to the level of the type of misconduct that has traditionally been recognize as sham conduct. If we are concerned with the application of the sham exception to this case, I think we should all thank the senior partner of Kaye, Scholer for the fine law review article he wrote on the subject.

THE COURT: He didn't help them.

MR. WRIGHT: He didn't help them. His exception was a very narrow amendment. The exceptions to the right have to be very narrowly construed.

[13] THE COURT: His view seems to be that all you is need is a genuine intention to influence legislative action, period.

MR. WRIGHT: And to the extent that that is the test—

THE COURT: Or any other government action.

MR. WRIGHT: To the extent that that is the test, we all considered whether or not we would even submit a jury question on that, and we all agreed that jury question made no sense, because there is no doubt that what Allied was endeavoring to do was to affect the outcome. That was the reason they were there, the very reason they were participating. The very thing we were accused of as wrongdoing: the effort to affect the outcome.

THE COURT: I would assume that what Professor Handler was saying in his article was that I went a lot further than I had to go and probably a lot further than I should have gone in having a trial at all.

MR. WRIGHT: No, sir. No, sir.

THE COURT: He seems to say I should have granted summary judgment.

MR. WRIGHT: But the reality is, and I will concede this, I believe that if you were going to characterize the nature of the National Fire Protection Association and the formulation of the National Electric **[14]** Code, I would say that it is a quasi-legislative activity. As Professor Handler would say, to the extent it is quasi-legislative it is entitled to the same analysis of sham as you would receive in the legislature.

Beyond that, however, because no one is quite prepared to say that this is quasi-legislative, assuming—assuming—that it is quasi-administrative in some sense, the formulations of sham are, as your Honor indicated, whether or not you are

legitimately attempting to affect the outcome or whether or not you have invoked the process simply as a means of injuring your competitor by embroiling him in repetitious, baseless claims which are expensive, which are tedious, and it is that very invocation of the process, without good faith, without valid—

THE COURT: I think it goes further than that. I think he would say that the sham exceptions are to be limited to those cases in which there is no genuine intent to influence governmental action.

MR. WRIGHT: Period.

THE COURT: Period.

MR. WRIGHT: To the extent that that is a correct formulation—and I think it is—there is no question that plaintiff has conceded that this cannot be sham conduct. That very issue was taken away from the jury.

THE COURT: There is no doubt that they have **[15]** conceded that there is a factual basis for a concern for safety.

MR. WRIGHT: There is no question about that, and I suppose that gets to the next question.

THE COURT: Which would be evidence that would lead to the conclusion that you had no genuine intent. At least the Second Circuit in the Litton case seems to suggest that the lack of a factual basis for your position is some evidence that you did not genuinely intend to influence legislative action.

MR. WRIGHT: In the Wheeling-Pitt case, Judge Hart said that the best indication that in that case Wheeling-Pitt genuinely intended to affect the outcome was, number one, that the objections that they were asserting had a scientific basis, and number two, that the organization in question in that case, UL, in fact accepted them. And that is what happened here. That is exactly what happened here. The only other formulation of sham, the only other issue in sham—and here again Justice Black would say that fraud, bribery and the like don't

even constitute sham in the legislative sphere, assuming for the moment that—

THE COURT: I would have trouble regarding bribery of a Congressman as protected by Noerr-Pennington. I don't think the courts would ever go that far if they **[16]** were presented with that issue.

MR. WRIGHT: Milton Handler would say that the plaintiff is not without a remedy but the remedy is not the Sherman Act. That is the response to that question.

THE COURT: Notwithstanding the distinction drawn between the legislative and the adjudicatory process, if the Supreme Court were presented with a case where a group of competitors schemed to bribe a majority of the Congress to get legislation, I have a feeling they would not find that protected by Noerr-Pennington.

MR. WRIGHT: Thank God that is not this case. This case involved only, in the context of sham, a question as to whether or not what we were asserting was valid, what we were asserting was something that we truly believed.

Whether or not bringing 150 people to a meeting rises to the level of such misconduct as to come within the sham exception, I suppose is the question that your Honor is going to have to deal with. Other than to say that such a holding would run contrary to every conception and every articulation of sham that has occurred in the cases to date, and other than to say that when you are following the rules, not engaging in conduct which in any sense could be construed as malum in se, criminal, tortious, in any way prohibited by any accepted code of conduct in the political process, going out and bringing a lot of people in and **[17]** having them vote the way you want them to vote is not only not unacceptable conduct, it is the way it works. That is precisely the way it works. So to label that—

THE COURT: It is the problem I have had with this case from the beginning.

MR. WRIGHT: Pardon me?

THE COURT: It is the problem I have had with this case from the beginning. In every club I have ever belonged to, some of that went on.

MR. WRIGHT: The jury finding that that conduct in some way subverted the process does not, your Honor, alleviate the Court's responsibility to make a judgment as to whether the facts as they existed—

THE COURT: As to the jury's finding, which is why I reject your arguments with respect to the inconsistency of the answers to the questions to the jury, I think you could comply with all the rules and still subvert the standards-making process within the limits of the testimony the jury heard from your expert—I think it was your expert.

MR. WRIGHT: Our expert, I am prepared to deal with that.

THE COURT: No, no, I am just saying I think the subversion of the process would have some very substantial relevance to the question of whether or not the standards-**[18]**making process is undermined for purposes of a rule-of-reason analysis so that you could no longer rely upon the pro-competitive aspects of standards setting as opposed to the anticompetitive aspects. I am not sure it has a lot of relevance in the context of Noerr-Pennington.

MR. WRIGHT: I think we would be faced with a situation where conduct which is classically political, conduct which is conceded to be a part of the political process for the purpose of achieving a legislative end, is somehow deemed to be not within the protection of a doctrine which is designed to protect the invocation and participation—

THE COURT: What I am saying is, to the extent that you argue that standards are pro-competitive, a subversion of the standards-making process would have some impact upon your pro-competitive versus your anticompetitive argument, as your expert testified. I don't know that it necessarily would require a finding that it is not protected by Noerr-Pennington.

MR. WRIGHT: As your Honor indicated, I will not deal with the question of reasonable or unreasonable, because your Honor seems to—

THE COURT: I think my charge on that was fair. Your arguments with respect to the way I put that issue to the jury in the least-restrictive-means analysis, and all **[19]** of that, I don't think fairly characterize what actually happened in the court. I think the charge was fair on that issue. I think your exceptions in that regard are without merit. To the extent that you argue there was a factual insufficiency for the jury's finding of least restrictive means and the role that I gave that in my charge, their arguments are more persuasive than yours. All I am saying is that it doesn't follow that because you subverted the spirit of the standards-making process, so to speak, as the jury so found, that it necessarily follows that you are not protected by Noerr-Pennington unless you subverted it in a way that Noerr-Pennington and the sham exception would make unprotected. That is all.

MR. WRIGHT: And it is our basic position that bringing 150 people to the meeting to voice a valid point of view, which is not in any sense a violation of the rules of the organization in question, could not under any accepted holding of sham be viewed as sham conduct.

THE COURT: I think I have your argument. I think I should hear from Mr. Yerman.

MR. WRIGHT: Can I make two points?

THE COURT: Yes.

MR. WRIGHT: To the extent that Noerr has a theoretical basis other than the First Amendment, your Honor, it concerns also the question of whether or not the **[20]** Sherman Act was intended to cover collective efforts to persuade third parties to take action, and there is a finding by the jury that the ultimate decision here was not made on the floor; the ultimate decision was made by the board of directors.

THE COURT: That is like saying the Court of Appeals makes the ultimate decision on whether a conviction should be affirmed, but they may find themselves limited by what the trial court has done, which is, think, what happened here.

MR. WRIGHT: However, the facts don't indicate that. The facts indicate that the function of the standards council and the board of directors was to conduct de novo review not only of the procedural—

THE COURT: But I think their findings make it very clear, from what I saw at the trial, that they felt that because the rules had not been broken, there was very little they could do about it. That is pretty much what they said.

MR. WRIGHT: I disagree with that, your Honor. But nevertheless—

THE COURT: That is what the document in evidence suggests.

MR. WRIGHT: One last point. It is a policy argument.

[21] THE COURT: So I don't think that is dispositive. What about their argument, which is probably the best argument they make, I think, that exceptions to the antitrust law should be narrowly construed and therefore I should not construe it broadly?

MR. WRIGHT: It runs directly contrary to Justice Black. Justice Black said the opposite. Justice Black said that when you are in the political process, when you are in the realm of petitioning government, the sham exception to the validity of that conduct is to be narrowly construed. And that leads me directly to my point, the policy argument.

THE COURT: The question is, is Noerr-Pennington an exception to the antitrust laws or is it an interpretation of the antitrust laws?

MR. WRIGHT: The Second Circuit says it is an interpretation of the antitrust laws; however, grounded in very fundamental First Amendment freedoms. That is, when drafters of

the Sherman Act sat down and Congress had thought about whether or not they wanted to make a violation of the antitrust laws efforts by persons to go convince their Congressmen to legislate against their competitors, they would have specifically said that the Sherman Act was not intended to cover that kind of activity, otherwise it is impossible to reconcile the Sherman Act **[22]** within the dictates of the First Amendment.

Futhermore, that kind of conduct is simply not the kind of conduct that has been traditionally recognized as a private restraint. It is not a joint boycott. It is not a joint boycott when the restriction, when the restraint, flows from the legislature. And to the extent that the efforts were to convince the legislature to erect what in the final analysis may be a boycott, they can't get in the marketplace. Why? Because the legislature says they can't. To the extent that that was the approach, that is protected. That has to be protected.

The policy argument that I was going to refer to relates to recent events, recent events.

THE COURT: What do you say the law should be with respect to narrow exceptions to the antitrust laws?

MR. WRIGHT: That when you are balancing the application of the Sherman Act against First Amendment protections, the balance has to be tipped in favor of First Amendment protections. That is my response.

THE COURT: Mr. Yerman, you have heard the questions so you know what to respond to.

MR. YERMAN: Yes, that is correct.

THE COURT: You don't have to belabor all of the other things that I resolved in your favor.

Is the FTC going to argue, too? Didn't they **[23]** file an amicus curiae brief?

MR. YERMAN: They filed a brief.

THE COURT: Are they here?

MR. YERMAN: I don't know.

THE COURT: Maybe we never notified them to be here.

MR. YERMAN: Your Honor, Mr. Wright ended with a discussion as to the policy and a discussion as to the First Amendment rights or the constitutional rights as being a predominant issue. I would like to read to your Honor from Mr. Justice Black, who Mr. Wright seems to be relying on, in Giboney, cited extensively in our briefs.

"It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed that an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, advanced, or carried out by means of language, either spoken, written or printed. Such an expansive interpretation of the constitutional guarantees of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society."

THE COURT: But the underlying assumption is **[24]** that the conduct is legal to begin with, and that is the issue we have to resolve here.

MR. YERMAN: If I could just go on. Another rather well-known champion of freedom of speech, Mr. Justice Douglas, quoted that language in particular in California Transport, where he said and went on to say:

"First Amendment rights are not immunized from regulation when they are used as a integral part of conduct which violates a valid statute."

So, your Honor, I was coming exactly to the point you raised. I think the First Amendment for these purposes is an irrelevancy.

THE COURT: It is not an irrelevancy to the extent that it is part of the reasons why we had Noerr-Pennington in the first place.

MR. YERMAN: I will grant your Honor that, of course. But to the extent that one cloaks illegal conduct—and I think that is where we are—in the guise of speech, the constitutional—

THE COURT: I don't have any trouble with the notion that if I rob a bank and I say, "Give me your money," the fact that I am using speech does not make my conduct protected.

MR. YERMAN: If you rig a vote, does your right to vote immunize your conduct?

[25] THE COURT: The question is, how do you rig it?

MR. YERMAN: The question is, if you bring in 250 people who otherwise wouldn't have voted, and a court and a jury have already found that that violates the consensus standard making process of the organization, haven't you committed a violation which you are trying to cloak with a claim that voting is the essence of political life?

THE COURT: Is that any different from getting out the vote in any organization?

MR. YERMAN: Let me turn to that.

THE COURT: Isn't that part of the democratic process, getting out the vote?

MR. YERMAN: I have no problem with getting out the vote. Let's turn to that.

THE COURT: In the last election Jesse Jackson went through the South signing up black voters and the Reagan people were out there signing up white voters. Isn't that what happens all the time?

MR. YERMAN: That's right, and Mr. Jackson was petitioning, he was exercising his constitutional right to have people vote their conscience. That is not what Allied did.

THE COURT: Not necessarily to vote their conscience. During the course of a political campaign **[26]** there are appeals to racism, sexism, ethnicity. People at times aren't voting their conscience at all; they are voting their prejudices.

MR. YERMAN: That is true.

THE COURT: Their self-interest also.

MR. YERMAN: Your Honor, if I tell someone who wouldn't otherwise vote that I will pay you to go to the polls and vote, and I want you to do that because you and I are in business together and we need that vote to pass this law that is to keep the other guy's product out of the code, that violates—

THE COURT: If there were no election law against it, that would not be illegal.

MR. YERMAN: Well, there is. 18 U.S.C. 597. It is a crime. It is a crime in the State of New York. And it is a crime in the U.S. Senate—well, it violates the rules of the U.S. Senate, if I am a company, to pay the expenses of a Senator to go and vote if he otherwise wouldn't have gone. That is right.

THE COURT: That may be.

MR. YERMAN: Your Honor, I don't know that we have these—

THE COURT: Is there any rule of the NFPA or any statute that prohibits them from doing what they did here?

MR. YERMAN: I don't think we have to worry **[27]** about that. The jury has already held that they violated consensus standard making of the NFPA.

THE COURT: I think that may be more relevant to the rule of reason than to Noerr-Pennington.

MR. YERMAN: But, your Honor, we all understand that conduct that subverts the process, conduct that is so shocking and outrageous, can't be protected by Noerr, no matter how you formulate Noerr.

THE COURT: The problem I have had with your argument, Mr. Yerman—maybe my conscience is not scrupulous enough —is that it really hasn't been shocked throughout this case by the defendant's conduct. My conscience has not been shocked, nor have I been impressed by the outrageous nature of what they did. What they did was to go out and sign up some voters and bring them to the meeting to vote their way, and you had the same privilege and you lost. Isn't that what it is all about? What is so outrageous about that? Had you brought five or eight more votes to the meeting you would have come out on top and they would have complained about your outrageous conduct. Isn't that what it is all about?

MR. YERMAN: I suppose I can't thicken your thin skin, but—

THE COURT: I say, as an ordinary part of every election I have ever been party to or seen, that's the way **[28]** it works—right down to my fraternity in college.

MR. YERMAN: I remember you said that. I have been living with that fraternity since the first day of the trial.

THE COURT: Did you belong to a college fraternity?

MR. YERMAN: I wish you never joined a fraternity, your Honor. This case might have gone along differently.

THE COURT: Did you ever belong to a Holy Name Society or one of those types of organizations?

MR. YERMAN: If I had a son I would never let him near a fraternity.

THE COURT: What about a Student Council election?

MR. YERMAN: Let me go back, in all seriousness, to the point we talked about a few moments ago. Because if I am correct—and I am, your Honor—that if what they did with these people were done in the Congressional ambit it would be a crime, then how can you excuse it at the NFPA?

THE COURT: Because there is no specific law that makes it illegal to pay the expenses of an NFPA member.

MR. YERMAN: I really would appreciate if I can give you these. Say, 18 U.S.C. 597.

THE COURT: This is a new argument anyway. I **[29]** don't think it is in your briefs.

MR. YERMAN: I will grant you I haven't given you statutes before.

THE COURT: It is not in the brief.

MR. YERMAN: Yes, it is. We talked about bribery all the way through the case. We have argued extensively—

THE COURT: In a case in which you had ample time, partly because of a delay caused by my calendar problems and partly because of a lot of time to brief the issues—and this case has not been known for its paucity of briefs—it is amazing that I should find this mentioned for the first time on argument. I have to think that it smacks of someone grabbing at the last straw one can find.

MR. YERMAN: If it is the straw that works, it is OK.

THE COURT: I am not sure it works.

MR. YEMRAN: We argued, your Honor, in our sham section that their conduct amounted to bribery. We said if you deem the NFPA to be a surrogate legislature, then they in fact bribed legislators. We made the argument.

THE COURT: Did you not pay the expenses of your own people to bring them to the meeting?

MR. YERMAN: We had three people, the same three **[30]** people we ever bring.

THE COURT: Did any rule forbid you from bringing more? Were you bribing your people when you paid their expenses?

MR. YERMAN: The argument we make, your Honor, is that the people they brought were people who otherwise wouldn't have come but for their conduct, but for their attempt to rig the vote. That is what the jury already found. If there is one thing that is pretty clear—and your Honor was pretty permissive in the evidence you allowed in; you allowed Allied to make a very strong argument that this was the kind of thing that went on every day, as you put it, it went on in the NFPA all the time—if there is one thing that is clear, it is that you took a liberal view of the evidence that would be allowed in the case to permit them in effect to show and to allow us to show whether this kind of conduct was what the NFPA allowed or not. And the one thing the jury found, if nothing else, was that, no, this is not a part of the game, this is not what you are supposed to do. You are not supposed to bring in 250 votes.

THE COURT: I don't think you have a fair argument that what they did here was bribery merely because there happened to be a specific statute that forbids a Congressman from accepting expenses.

[31] MR. YERMAN: I would just mention to you, if you don't mind, one second—

THE COURT: Bribery never applies to nonpublic officials.

MR. YERMAN: Oh, my point is that if it would have been bribery in a Congressional ambit, however, how can you hold them to a lower standard than you would hold the Congressmen?

THE COURT: Because I don't think these people are Congressmen.

MR. YERMAN: If they are not a surrogate legislature, then why are you going to apply Noerr altogether?

THE COURT: Because I think the Supreme Court certainly has held squarely in Noerr that conduct outside the legislative arena is protected. If lies are protected, I have a hard time understanding why paying someone's expenses to go to a meeting is not protected.

MR. YERMAN: Because lies are speech, but rigging a vote and tampering and subverting the process is conduct.

THE COURT: Lies are not protected speech. Even under your argument a lie would not be protected speech.

MR. YERMAN: It depends on the context. It depends on the context.

[32] THE COURT: Lies are never protected speech.

MR. YERMAN: I am going to get out these sections, if you don't mind.

THE COURT: You can get them out if you want to.

MR. YERMAN: 18 U.S.C. 600, and I would also suggest that you look at some of the New York laws. New York Election Law 17-140, 17-102, 17-142. I think that is enough.

Let me go on for a second. We talked a little bit about—

THE COURT: Are these Massachusetts statutes?

MR. YERMAN: New York. New York.

THE COURT: I don't know what relevance that has to a meeting in Massachusetts.

MR. YERMAN: I give them to you as an example of what state laws would hold.

THE COURT: Don't give me irrelevant state law. The meeting took place in Massachusetts.

MR. YERMAN: Then I will stay with U.S.C. The point, your Honor, is not so much whether the—well, all right, I will pass that, your Honor.

You mentioned a minute ago Hydrolevel. Let me get to that because you didn't know where Hydrolevel—

THE COURT: The Noerr-Pennington issue was never raised there.

[33] MR. YERMAN: To the best of my knowledge, it wasn't. Harold Tyler represented ASME in that case. I think Harold Tyler heard of Noerr-Pennington. That case, Hydrolevel, was decided a year before Wheeler. I am not going to try to read anybody's mind, but I submit to you that nobody ever thought of applying Noerr to that organization. Nobody ever would have dreamed of doing it. That is why it wasn't argued. And I will tell you—

THE COURT: Even good lawyers sometimes don't make arguments they should make.

MR. YERMAN: There were pretty good ones sitting on the Supreme Court and none of them thought of it either.

THE COURT: Because judges don't frame issues for the parties; lawyers do.

MR. YERMAN: I understand that, but listen to what they said.

THE COURT: Don't they say good cases make bad law and advocacy shapes the law?

MR. YERMAN: "A standard-setting organization like ASME"—they have already said about ASME in this same opinion that: "These codes, while only advisory, have a powerful influence: federal regulations have incorporated many of them by reference, as have the laws of most states, the ordinances of major cities, and the laws of all the provinces of Canada."

[34] So they were very much aware of the ASME code. It sounds like NFPA, OK?

In that same context what do they say about Asme?

"A standard-setting organization like ASME can be rife with opportunities for anticompetitive activity. Many of ASME's officials are associated with members of the industries regulated by ASME's codes." You could read "NFPA" for any of these.

THE COURT: But NFPA is not charged with any wrongdoing here and they were specifically dropped as a party, so that is irrelevant here.

MR. YERMAN: I will come to that. "Although, undoubtedly, most serve ASME without concern for the interests of their corporate employers, some may well view their positions with ASME, at least in part, as an opportunity to benefit their employers. When the great influence of ASME's reputation is placed at their disposal, the less altruistic of ASME's agents have an opportunity to harm their employers' competitors through manipulation of ASME's codes."

Read "NFPA" all the way through. Does that sound like an organization where the Supreme Court would allow Noerr-Pennington protection to the agents? They are talking about what the agents did. For the people like Beile—

[35] THE COURT: The facts are so far removed from the facts of this case as to be not even relevant.

MR. YERMAN: How different is what the guy did in ASME in setting up that phony letter from what Beile did in rigging the vote? How different is that?

THE COURT: Because, first of all, you have a wider range of what is permissible conduct when you are dealing with the setting of standards which is legislative than you have with what is adjudicatory. The Supreme Court has indicated that very clearly; the Second Circuit has followed that. And, what's more, the situation in that case is akin to a judge being on the payroll. I don't think it is anything like this case.

MR. YERMAN: I guess it—

THE COURT: Maybe that is why Judge Tyler didn't raise the Noerr-Pennington issue.

MR. YERMAN: I guess it turns on how thick your skin is.

THE COURT: It turns upon whether the cases are factually relevant or not.

MR. YERMAN: I think that one has to at least question whether it is appropriate to fashion a rule and build an extension to the antitrust laws to allow the Beiles of this world to be cloaked with antitrust immunity after what you and the jury saw them do at the NFPA to say **[36]** that not only what you did is OK, you rigged the vote, we all know it, but you can do it again or you can do worse and it is perfectly OK, you're exempt.

THE COURT: Isn't the remedy to change the rules of the organization?

MR. YERMAN: How many rules can you change? Do you know what the rules provide now in terms of getting something out of a code panel? You need two-thirds vote to get something out of a code panel. All you have to do is get three of your buddies on the code panel, pair your votes, and you can block it from the getting to the floor.

THE COURT: And then you have a remedy to do it yourself.

MR. YERMAN: Do what yourself?

THE COURT: The same thing they are doing. Bring your own voters to the meeting or go to the legislatures and tell them that the standard-making procedures of the NFPA are a farce and should not be followed. You have a remedy.

MR. YERMAN: If you want to take the former possibility, you recall I asked the jury that question: Is that how you want your codes written? And I think that is why it was a rule-of-reason violation here, so I think that was easy. And if your Honor wants to have more government regulation, not less, if your Honor wants to take things **[37]** like the NEC and see them wrecked so that the private organizations will not be able to use them, give them antitrust immunity and let them go on their merry way, as the Supreme Court says you can expect them to, let them go and do all this and the entire system will fall apart before your eyes. You won't have an NFPA; you will have every government setting up its own code and you will have a far less acceptable method than you have today.

THE COURT: Isn't that what Noerr-Pennington is about, because the legislature may not follow them?

MR. YERMAN: It brings me a little bit to the whole state action issue, which is an interesting parallel question here, a question I really need to ask you. The grounding of the Wheeling case and the more recent case, Sessions, was that in effect these are surrogate legislatures, and they use the words delegate authority by the state. I think your Honor is essentially saying the same thing. We all know that under state action, unless you have strict mandates, strict directions, strict supervision by the state, they wouldn't have state action immunity.

THE COURT: I don't think we are dealing with that question.

MR. YERMAN: No, we haven't. Do you know why it hasn't been raised? Because Allied wouldn't have the **[38]** temerity to argue—

THE COURT: Mr. Wright has a lot of temerity.

MR. WRIGHT: I do.

THE COURT: He would have raised it, I am sure.

MR. WRIGHT: You are quite right, your Honor.

MR. YERMAN: He wouldn't have the temerity to argue that they are covered by state action because they don't satisfy all the rules, that's correct. But think about the logic of it, your Honor. You would never give them state action immunity because—

THE COURT: The biggest problem, Mr. Yerman, is that I am not writing on a blank slate. I am writing on a slate which includes three Supreme Court decisions which are basically the touchstones. The Supreme Court in the Noerr case itself, which is the foundation case, has made it very plain that conduct outside of the legislative halls can be protected under Noerr-Pennington. They also said that conduct which smacks of unethical conduct, deceitful conduct, fraudulent conduct

even, is protectable under Noerr-Pennington. Against that background you want me to hold that this conduct, which amounts to a vote stacking at best, giving it the best possible interpretation, is somehow or other more outrageous and more unprotectable than lies. I am not writing on a blank slate.

MR. YERMAN: Maybe we are looking at different **[39]** slates, but there are essentially two cases that have said that the NFPA should get Noerr immunity. One is this Wheeling case and the other is this later Sessions case, which I submit to you are both distinguishable and wrong.

THE COURT: That is Judge Pfaelzer's case.

MR. YERMAN: Yes, exactly. I think you saw a letter from us on that. That case is clearly distinguishable.

THE COURT: Do you have a case in which the sham exception has ever been applied where there was concededly a genuine intent to influence legislative action and where there was a factual basis for the position taken?

MR. YERMAN: I can't think of one.

THE COURT: I didn't see one in your brief nor did I see one in Professor Handler's article.

MR. YERMAN: Speaking of Professor Handler—

THE COURT: If anybody sank a torpedo below the waterline aimed at your theory, I guess it was he.

MR. YERMAN: You and Mr. Wright had an interesting discussion I listened to as well, concerning what Professor Handler might or might not say about any of those particular situations. I want to be clear I don't speak for Professor Handler and, with all respect, he doesn't speak for me.

THE COURT: But he is an expert, is he not?

[40] MR. YERMAN: Professor Handler surely is an expert.

THE COURT: In antitrust law?

MR. YERMAN: In antitrust law.

THE COURT: He knows whereof he speaks.

MR. YERMAN: I answer questions; I don't act like the witnesses on the other side. That's correct.

THE COURT: We will seal this record so we don't show it to your senior partner, otherwise you are liable to find your percentage substantially reduced.

MR. YERMAN: Your Honor, I could argue sham. I believe there is a sham here. I believe this subversion of the process would amount to sham. I believe vote stacking would amount to sham. I believe what amounts to bribery in bringing people to vote subverted the process. People who did it because they had an economic interest because they worked for Allied or were associated with them and had really no alternative under the circumstances and did it under economic interest, I submit to you that would amount to sham.

But, quite frankly, your Honor, I don't believe we get to sham. I don't believe we get to sham, even though they paid their way to get there, even though they paid all their expenses, even though it is clear they wouldn't have been there but for Allied doing that.

[41] THE COURT: I may agree with you but for different reasons. I may agree we don't get to sham unless we find that the Noerr-Pennington doctrine applies. I agree with that.

MR. YERMAN: Yes. So I submit to you—

THE COURT: But if Noerr-Pennington is clearly applicable, I don't think there is any way the facts of this case would fit within the sham exception of the Noerr-Pennington doctrine.

MR. YERMAN: Coming back to Noerr-Pennington itself, there is no legal authority other than these two cases that says that you apply Noerr-Pennington immunity, this blanket immunity, down to the level of an NFPA. I understand your Honor's point.

THE COURT: It is not my point; it is the Supreme Court's point.

MR. YERMAN: I understand the argument that action outside the halls of Congress can still be immunized by Noerr-Pennington. But I ask your Honor, where would you draw that line? I mean, at what point? At what point does it become that Noerr-Pennington has swallowed the exception and swallowed the world? You talk about the exception being raised narrowly.

THE COURT: Mr. Wright does have a point. Where you argue that your injury flows, maybe that is where the **[42]** line is drawn. In any antitrust case where plaintiff alleges his injury flows from governmental action which is the predicate for his damages, Noerr-Pennington should apply.

MR. YERMAN: I am glad you raised the question.

THE COURT: That is his argument.

MR. YERMAN: Remember the damage charge. The damages that we were awarded in this case, your Honor, were strictly limited to the stigma placed upon the product by the denial of NEC approval. We were expressly told and the jury was expressly instructed there would be no damages awarded and they were not to consider any of the effects of lobbying or state action, or the actions of the state, rather, in considering the damages in the case. So I will take your Honor at your word. Hold me to the damage theory to which we were held and to the verdict to which we were awarded, and that is the issuance of the NEC and nothing else.

THE COURT: It has been a long while since I tried this case, but that sounds like a bit of a distortion of what happened, but I will let Mr. Wright respond to that.

MR. YERMAN: Your Honor—

THE COURT: I think there was a reason for that which you are not explaining. I don't fully remember it right now, but I am sure Mr. Wright will remind me.

[43] MR. YERMAN: Distortion is not a word that slides by me quickly. I do not mean to distort. I am giving you my best recollection.

THE COURT: I think your theory of damages all along was that your damages flowed from the fact that you were not approved and therefore not adopted by the state legislatures involved.

MR. YERMAN: We had discussions about that.

THE COURT: That was your theory of damages all along. When did you change it?

MR. YERMAN: When we got to the damage theory, and I won't say when did we change it, the damage theory really crystallized as the case progressed and in light of your Honor's thinking and rulings on Noerr.

THE COURT: Is it your position in this case that your damage did not flow from legislative action?

MR. YERMAN: Absolutely. Absolutely. And your Honor instructed—

THE COURT: That is not the case I remember trying.

MR. YERMAN: That is not the damage claim I would have preferred, I will grant you that, your Honor. But that is what was imposed upon us by your Honor's charge. I notice your clerk going to the transcript. Take a look at 3264 et seq., because you are welcome to read it. I **[44]** read it with some care.

THE COURT: I will read it.

MR. YERMAN: I certainly wouldn't mean to distort. But your Honor was very careful to charge that it was limited to the stigma, and that what they did in lobbying and all the rest of that was not to be considered.

THE COURT: But that was a different question. You never retreated for the purposes of this trial from your legal theory that your damages were caused by the nonadoption of your product by the state legislature.

MR. YERMAN: I think I have to disagree with that. I think I have to disagree with that. It was not something we did totally voluntarily but that is how it ended by virtue of your charge, your Honor. Let me read you what you said.

THE COURT: The computation of damages is one thing and causation is another. I don't think you ever retreated from your notion that your damages were caused by the nonadoption of your product by the state legislature.

MR. YERMAN: If I could just read.

THE COURT: Maybe that is the distortion that is lurking in the back of my mind.

MR. YERMAN: This is your Honor in the charge:

"The plaintiff does not seek damages resulting from any of the defendant's conduct other than its conduct **[45]** at the May 1980 meeting and its marketing of that defeat in the marketplace."

THE COURT: Correct.

MR. YERMAN: "To the extent that the defendant has sought to bring to the plaintiff's attention safety questions, to the extent the defendant has sought to legislate—to lobby before legislative bodies or political parties with respect to the safety question, the plaintiff does not claim any damages from that conduct, and such conduct may not be a proper predicate for you to assess any damages"—

THE COURT: And that is the distortion I had in my mind. All that charge is telling the jury is that obviously you were claiming no damages for conduct you concededly admitted was protected by Noerr-Pennington. That is the distortion I have in mind.

I have heard enough of your argument.

Mr. Wright, do you want to reply?

MR. WRIGHT: The theory of the case is embodied in paragraph 13 of the complaint. Paragraph 13 of the complaint describes what the National Fire Protection Association is and

does, and it says very explicitly, "NEC is advisory and does not carry the force of law. However, the NEC has been widely adopted as a comprehensive, mandatory safety standard by govermental bodies exercising **[46]** legal jurisdiction over electrical installations."

THE COURT: What are you reading from?

MR. WRIGHT: Paragraph 13 of the complaint, which was never amended, your Honor. "Approximately 37 states have adopted the NEC in whole or in substantial part as their statewide electrical code."

THE COURT: You might as well have quoted their opening and the summation, where I am sure the same statements were made.

MR. WRIGHT: "Thus, as a practical matter, any new product within the purview of the NEC must carry its approval in order effectively to compete and be sold in most parts of the nation." That is their theory, your Honor.

THE COURT: I don't think it was ever retreated from, and the passage from my charge you referred to, now that my memory has been refreshed, has to do with taking away from the jury any damage claims resulting from conduct concededly protected by Noerr-Pennington, to wit, the lobbying activities and your education of the public; that the damage claim was limited strictly to whatever damages flowed from the nonadoption of the product by NFPA.

Do you want to respond to his bribery argument?

MR. WRIGHT: Only that I guess if we committed a bribery, then bribery is rampant in the NFPA because—

[47] THE COURT: He said that you can't pay a Congressman's expenses so why should you be able to pay an NFPA member's expenses? It would not be protected at the Congressional level, why should you have more protection than you had at the legislative level? Admittedly the argument was sprung as somewhat of a surprise on you, because it wasn't argued in the briefs, as voluminous as they were.

MR. WRIGHT: The argument would be analogous if someone put $500 in cash in a paper bag and slipped it to the members of the board of directors and the standards council who were the governing body.

THE COURT: No, he says you can't pay a Congressman's expenses; that is bribery. Therefore, if you had paid a Congressman's expenses to go to Washington to vote on a bill, that would be bribery, so paying the expenses of an NFPA member is the same thing. Since you would not be protected in the halls of Congress, why should you be protected one step removed from the halls of Congress?

MR. WRIGHT: I understand the logic of the position. The reality is and the testimony is that the chairman of the NFPA was asked in a deposition, and the evidence is before you, as to whether or not it was in any sense contrary to the way the NFPA has always operated that **[48]** companies pay the membership fees and expenses of people who come to the meeting. Mr. van der Voort sat on this stand and I asked him very specifically whether his expenses were paid and whether all the other people who came from the plastics industry, to his knowledge, whether their expenses were paid. He said very definitely that was the case; there is nothing extraordinary about that.

The plain fact of the matter is, it has nothing to do with paying expenses. It rather has to do with the fact that they say that 150 is somehow a criminal violation of something, and 10 is not. How many is too many? The bribery is a total straw man, because everybody's expenses are paid by the companies.

The other response to that, the constitutional response to that, is that if you are dealing with petitioning of government, the Supreme Court of the United States has held specifically that companies are entitled to make contributions, in the Bellotti case, which we cited to your Honor.

THE COURT: But he says you can't pay a Congressman's expenses.

MR. WRIGHT: I suppose I can't deal with the logic of that position. I cannot deal with the logic of that position. However, it runs contrary to the way this organization works, it runs contrary to what is acceptable **[49]** behavior in the course of petitioning government.

THE COURT: In other words, stacking the vote is OK, he says, as I understand his argument, bringing them in is OK; what is really criminal here and takes you out of Noerr-Pennington is that you paid their expenses.

MR. WRIGHT: But I asked everyone who participates in the NFPA process, from the chairman of the organization down to Mr. van der Voort, whether or not that was the case, and they all unequivocally said there is nothing wrong with that, it is done all the while.

So the response to that is either the whole organization is rife with bribery and conspiracy or that kind of conduct cannot be the type of conduct, in the context of this organization, that rises to the level of criminal misconduct? It is simply not.

Again, I understand the logic of it. However, the reality of it is something entirely different, entirely different.

THE COURT: I am inclined to agree. I think if you are dealing with a situation in which the conduct was prescribed by the rules of the organization, you have a different case. The fact that at the Congressional level there may be a specific statute prohibiting that type of conduct is not dispositive for purposes of the Noerr-Pennington analysis.

[50] MR. WRIGHT: I have one observation, your Honor—that is the policy argument—and that is whether or not, if Noerr is applied here, standards making will be undermined and fall of its own weight because of the participation of interest groups. I submit to your Honor that if Noerr is not applied here, what will happen to this organization and to most of the standards-making organizations in this country is the following, and it has happened. People will be afraid to participate. They will be afraid to participate because they cannot go to an organization like this and they cannot stand up

and say, "I believe a product is unsafe; in fact, it is unsafe." Because if they do so and if some amorphous rationale is proposed by a lawyer some day that their activities which are not prohibited by the organization somehow violate the spirit of that organization, those individuals will be subjected to what we have been subjected to, and that is a five-year antitrust ordeal. Mr. Levinrad, I don't know if you remember Mr. Levinrad—

THE COURT: I remember Mr. Levinrad.

MR. WRIGHT: —Mr. Levinrad was one of the arch-opponents of plastics in construction and one of the foremost advocates of the need to deal with the toxicity issue. And we quote at great length from his comments in the '80 and '81 NEC. In the last session just last month **[51]** Mr. Levinrad stood up and said to the membership, "I am personally getting tired of this whole toxicity issue. It's been going on for a number of years"—that is not the quote, Allison. I will give you the quote. What he said was—

THE COURT: Sometimes these notes are not as helpful as they should be.

MR. WRIGHT: You know what he said? He said, "Someone came in to me the other day and said government officials are now subject to the antitrust laws. And that frightens me, ladies and gentlemen, it frightens me, and I think we ought to stop all of this and let this product go in."

He voiced, articulated, precisely the concern that we have been saying all along. If you hold the club of an antitrust trial over individuals because they are articulating genuine, valid, scientific concerns to standards, if you say you can be sued under the antitrust laws for that kind of conduct, everybody is going to keep their mouths shut.

If I were the general counsel to a company, and they came in and said, "Should we oppose this?" and the questions were, is there a valid basis for it? Yes. Is it in fact invalid? Yes. I still don't think you should go. I still don't think you should go, because Noerr-Pennington **[52]** doesn't apply, they can sue

you, and five years later, win or lose, you are going to spend God knows how much money defending yourself.

That is precisely why Noerr-Pennington exists. That is precisely why Noerr-Pennington exists. You can't submit people in the course of petitioning government to that kind of fear. Noerr-Pennington says, we will remove that fear. Petition. Speak out freely. It is safe to do so. That is what this case is all about.

THE COURT: I am prepared to rule today after an appropriate recess.

MR. YERMAN: Can I just respond to one small point, which is irrelevant but since Mr. Wright raised it. He mentioned a meeting. I thought you would be interested to know that at that same meeting the NFPA voted to eliminate the three-story restriction on the product.

MR. WRIGHT: Because everybody was afraid to say otherwise.

MR. YERMAN: By a vote of 600 to 10.

THE COURT: I really had intended to write an opinion in this case. Unfortunately, the pressures of my criminal calendar over the past year have foreclosed the likelihood that I could do that within the time parameters I originally envisioned. I scheduled this case for argument today with the assumption that, if possible, I **[53]** would rule from the bench, dictate my opinion into the record, so there would be no further delay. This case was tried, I think, and finished last May, and the papers were in sometime last summer, in September or thereabouts. I think that the process of the appeal has already been delayed by my inability to prepare the opinion I intended to prepare and hear argument earlier. As the parties are aware, I have been constantly engaged in criminal trials since September, including a five-month multidefendant narcotic trial, which foreclosed my ability to do exactly what I intended to do. I do not think that the appeal of this case should be further delayed, so I am prepared to rule after a five-minute recess.

(Recess)

[FILED AUG 1 1986]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 6250 (JES)

INDIAN HEAD INC.,
Plaintiff,

—against—

ALLIED TUBE & CONDUIT CORPORATION,
Defendant.

ORDER

WHEREAS, a Jury Trial having been held before the Honorable John E. Sprizzo, U.S.D.J., beginning on March 4, 1985, and the jury, at the conclusion of the trial, having answered the attached interrogatories and in so doing having rendered a verdict in favor of plaintiff in the sum of $3,800,000.00; and

WHEREAS, defendant having moved for judgment notwithstanding the jury verdict on the grounds (1) that the evidence introduced at trial was insufficient as a matter of law to sustain the jury's answers to Interrogatories 5, 10, 11 and 12, (2) that the jury's answers to the interrogatories were insufficient as a matter of law to sustain its verdict that defendant's conduct constituted an unreasonable restraint of trade, and (3) that the *Noerr-Pennington* doctrine and the First Amendment to the United States Constitution bar entry of judgment in plaintiff's favor; and

WHEREAS, defendant having moved for a new trial on the grounds (1) that the Court's charge to the jury with respect to the Rule of Reason was incorrect, (2) that the jury's answers to

the interrogatories were inconsistent, and (3) that the jury's answers to Interrogatories 5, 10 and 12 were not supported by the weight of the evidence; and

WHEREAS, the Court, on June 27, 1986, having issued a bench opinion with respect to defendant's motions;

IT IS HEREBY ORDERED:

(1) That defendant's motion for judgment notwithstanding the jury verdict is GRANTED on the ground that the *Noerr-Pennington* doctrine applies to this case; and

(2) That defendant's motion for judgment notwithstanding the jury verdict is DENIED in all other respects on the grounds (1) that the evidence introduced at trial was sufficient as a matter of law to sustain the jury's answers to Interrogatories 5, 10, 11 and 12, and (2) that the jury's answers to the interrogatories were sufficient to sustain its verdict that defendant's conduct constituted an unreasonable restraint of trade; and

(3) That plaintiff's motion for a new trial is DENIED on the grounds (1) that the Court's charge to the jury with respect to the Rule of Reason was correct, (2) that the jury's answers to the interrogatories were consistent, and (3) that the jury's answers to Interrogatories 5, 10 and 12 were supported by the weight of the evidence; and

(4) That in the event that this Court's ruling on defendant's motion for judgment notwithstanding the jury verdict is hereafter vacated or reversed, defendant's motion for a new trial should be DENIED on the grounds (1) that the Court's charge to the jury with respect to the Rule of Reason was correct, (2) that the jury's answers to the interrogatories were consistent, and (3) that the jury's answers to Interrogatories 5, 10 and 12 were supported by the weight of the evidence.

Dated: New York, NY
July 31, 1986

/s/ [JOHN E. SPRIZZO]
U.S.D.J.

[FILED AUG 4 1986]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 6250 (JES)

INDIAN HEAD INC.,
Plaintiff,

—against—

ALLIED TUBE & CONDUIT CORPORATION,
Defendant.

A Jury Trial before the Honorable John E. Sprizzo, U.S.D.J., having begun on March 4, 1985, and at the conclusion of the trial the jury having answered the attached interrogatories and in so doing having returned a verdict in favor of the plaintiff in the sum of $3,800,000.00; and the Court having reserved its decision on legal defense, treble damages and attorneys' fees; and the Court thereafter on June 27, 1986 having issued the attached bench opinion with respect to defendant's motions for judgment notwithstanding the jury verdict and for a new trial; and the Court, on July 31, 1986 having issued the attached ORDER (i) that defendant's motion for judgment notwithstanding the jury verdict be GRANTED and that judgment be entered in favor of defendant, (ii) that defendant's motion for a new trial be DENIED, and (iii) that in the event that the Court's ruling on defendant's motion for judgment notwithstanding the jury verdict is hereafter vacated or reversed, defendant's motion for a new trial should be DENIED, it is,

ORDERED, ADJUDGED AND DECREED: That judgment be and it is hereby entered in favor of defendant and that the complaint be and it is hereby dismissed.

Dated: New York, N.Y.
July 31, 1986

/s/ [JOHN E. SPRIZZO]
U.S.D.J.

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 8-6-86.

[FILED APR 22 1987]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 86-7734, -7758

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of April one thousand nine hundred and eighty-seven.

Present: HON. J. EDWARD LUMBARD
HON. AMALYA L. KEARSE
HON. GEORGE C. PRATT

Circuit Judges.

INDIAN HEAD, INC.,

Plaintiff-Apellant,
Cross-Appellee,

—against—

ALLIED TUBE & CONDUIT CORPORATION,

Defendant-Appellee,
Cross-Appellant.

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgment of said District Court be and it hereby is vacated and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court.

ELAINE B. GOLDSMITH,
Clerk

/s/ EDWARD J. GUARDARO
By: Edward J. Guardaro,
Deputy Clerk

[RECEIVED MAR 4 1980]

(Letterhead of REPUBLIC STEEL, Cleveland, Ohio)

February 29, 1980

Mr. Steve E. Chehi
Manager, Sales Engineering
Bethlehem Steel Corporation
Bethlehem, PA 18016

Dear Steve:

Subject: 1981 National Electrical Code
Request for CONSTAND Action

The future of the role of steel conduit in construction is in serious danger . . . as a result of certain proposals up for adoption in the proposed 1981 National Electrical Code.

If these proposals are adopted the entire concept of the use of non-combustible service equipment materials in non-combustible construction is in danger. This involves steel pipe tubular products and flat roll products of many types.

The vote on the 1981 NEC takes place at the Sheraton Boston at 1 p.m., Tuesday, May 20, 1980.

The combined market well exceeds 1 million tons annual usage.

It appears that the National Electrical Code is the first major battleground for the attack on steel markets by segments of the plastic industry during the 80's.

The battle plan involves three major actions:

1. Consider what legal steps can be taken to:
   Receive a fair hearing on certain specific code proposals.
   Challenge questionable code panel actions and procedural issues.

2. Develop in simple, understandable form all the facts we can to support the steel position. This means:

   Refining all existing research and fact data;

   Developing new data to challenge specific issues.

3. Get people to the NFPA meeting in Boston in May to vote. To counter the plastics industry, steel needs 1,000 votes.

Specific requests for CONSTAND consideration include:

1. Investigation of legal recourses concerning NEC Code panel actions.

   A review by AISI Engineering and Legal staff is suggested to determine if NFPA-NEC code approval procedures have been abused to the point where AISI staff should ask the NEPA Standards Council or Board of Directors to:

   A. Conduct new NEC hearings based on evidence that the concerned code panels did not:
      1. Properly consider counter arguments,
      2. Adequately consider the foreseeability and probability of harm to the public that could occur should certain proposals be approved that are based on incomplete or misleading scientific data,
      3. Did not use or adopt the proper terminology in proposed code sections they approved,
      4. And, violated their own procedures to assure a fair hearing for all concerned parties.

   B. Return all of Panel 8 and Panel 16 to committee for complete review for the re-submittal in 1984, if allegations in 1.A are confirmed.

2. Development of needed fact data. AISI through the Engineering Division should be asked to develop the needed fact and research data to support the steel position against adoption of questioned proposals for

the 1981 NEC. Such action includes the following suggestions:

A. By the Sub-Committee on Fire Technology:
   1. A review of existing fire/smoke test criteria to support AISI position;
   2. Conducting special tests to determine:
      a. Flammability/smoke/toxic gas characteristics of certain plastic materials proposed for code approval in relation to steel performance.
      b. Performance of closed system conduit runs in relationship to the combustibility and integrity of wiring within the conduit.

      (These procedures underway as result of Sub-Committee of Fire Technology meeting 2/26/80)

B. By Engineering Division:
   1. Preparation of data on other than fire characteristics of plastic products being proposed for NEC approval.
   2. Preparation of all engineering data into a simplified written document for use at the NEC meeting in Boston and before if deemed appropriate.
   3. Presentations by Engineering Division staff to groups and individuals to gain their support of the steel position in Boston.
   4. Aid by staff in efforts by member companies to gain support for steel position with other organizations prior to Boston voting.

3. An all out effort to develop votes supporting the steel industry position in Boston. To do this it is suggested CONSTAND:

A. Ask each member company to register as many as possible of their individual company members to be present May 20 to vote. (One conduit manufacturer has pledged 100 votes)

B. Request the Engineering Division to urge as many potential voters as they can outside the steel industry to be present to vote.

C. Request all Engineering Division members and product staff men to be registered and present to vote.

D. Have the Engineering Division keep member companies informed of progress in securing votes in support of the AISI position.

This issue is clear. Is it worth keeping electrical, mechanical and hydraulic components and systems and materials in fire-rated, non-combustible construction truly non-combustible and non-smoke/toxic gas producing?

Since time is critical, these suggested actions should be considered as quickly as possible. All new applications for membership to NFPA must be processed by April 15 if they are to vote.

Please let me know what I can do to expedite this matter.

Sincerely yours,

R. E. Taylor
Chairman, Sub-Committee
Fire Technology
Republic Steel CONSTAND alternate

RET/sh

cc: Mr. R. Wildt
Mr. D. G. Cook
Mr. C. G. Tyson
Mr. R. G. Gawain
Mr. L. T. Young

INTER-OFFICE CORRESPONDENCE

FROM: James E. O'Donnell Date 1/22/80

To: James Griffin

Subject Electrical Non-Metallic Tubing (ENMT)

As you know, Panel #8 is now considering a proposal to permit the use of plastic EMT without restriction. The final vote on this at the current Code Panel Meeting is by ballot and this product could possibly be accepted. The last line of defense against this product would be later in the spring at the National Fire Protection Association Meeting in Boston, Massachusetts. It will certainly be challenged again at this meeting but the acceptance by Panel 8 is a giant step for the plastic industry toward the goal of full acceptance in the National Electrical Code.

In talking with Charlie Hart, the NECA representative, he explained that a challenge can only be made from the floor at the NFPA Meeting if we submitted comments in advance that are printed in the technical documentation publication. Have we or have others in our industry made such comments?

If we fail to keep this product out of the Code, we will certainly suffer the loss of a substantial portion of our EMT business in years to come.

/s/ JIM E. O'DONNELL/md
Jim E. O'Donnell

JEO'D:md

cc: J. Feeney

INTER-OFFICE CORRESPONDENCE

WHEATLAND TUBE COMPANY
WHEATLAND, PENNSYLVANIA, 16161

TO: J.E. Feeney, H. Weiss, P. Dooner, J. O'Donnell

DATE January 30, 1980

FROM J. L. Griffin

SUBJECT ARTICLE 331—ELECTRICAL NONMETALLIC TUBING (ENMT)

The attached copies of the proposal from the "Preprint" describes the product and its application. It is supposed to be rigid, in 3 sizes 1/2", 3/4", and 1". It is to be used with approved fitting, can be bent without heating, and can be used indiscriminately. Also attached is the U.L. fact-finding report on ENMT.

The NEMA 5 RN Code meeting in Washington, D.C. on January 30, 1980 produced the following points:

1) NEMA can do nothing for us.
2) Final ballot results will not actually be known until the publication of the "Technical Documentation" by NFPA in March.
3) Each individual company will be asked to provide for the attendance of as many NFPA voting members as possible. Voting eligibility requires NFPA membership 30 days prior to the NFPA meeting in May.
4) Individual members of 5 RN will have to contact influential members of the other NFPA sections for support in defeating adoption of this new Article 331—Electrical Nonmetallic Tubing.
5) Discussions regarding ENMT must be related to safety aspects only. Problems regarding restraint of trade are a very real concern. This situation precludes discussing other aspects of the product directly although free

discussion of the fact-finding report and other test data that might become available is permissible.

The Section meeting in February may produce other strategy, but I doubt that anything now will evolve from the meeting. Certain people will probably be assigned to make contact with various people that they may be able to influence prior to the NFPA meeting in Boston, which might require some travel, but all the activity we engage in will have to be low key.

I will keep in touch with Bob Taylor and Bill Biele and keep everyone informed if anything develops before the NEMA section meeting in Florida.

J. L. Griffin

lr

Enc.

REPUBLICSTEEL

Market Communications and Advertising
Interoffice Correspondence
General Office

February 25, 1980

Mr. T. E. Wilkens
Manager of Sales
Electrical Products
Steel and Tubes Division

Subject: NEMA STEEL CONDUIT 5RN SECTION MEETING REPORT CALL FOR URGENT ACTION

The future of the role of steel conduit in construction is in serious danger . . . as a result of certain proposals up for adoption in the proposed 1981 National Electrical Code.

Also in danger is the entire concept of the use of non-cumbustible service equipment materials in non-cumbustible construction. This involves steel pipe, tubular products and flat roll products of many types.

The combined market well exceeds 1 million tons annual usage.

It appears that the National Electrical Code is the first major battleground for the attack on steel markets during the 80's.

The battle plan involves three major actions:

1. Get bodies to the NFPA meeting in Boston in May to vote. To counter the plastics industry we need 1,000 votes going.
2. Develop in simple, understandable form all the facts we can to support the steel position. This means:
   - Refining all existing research and fact data;
   - Developing new data to challenge specific issues.
3. Consider what legal steps can be taken to:

   - Remove specific code proposals from consideration;
   - Challenge questionable legal practices of code panel actions.

At question is:

- Restraint on due process of law;
- Unfair trade practice;
- Non-defined or improperly defined NFPA procedures.

Action under Plan Once includes:

1. Getting bodies to vote at the floor meetings. Allied Tube & Conduit has pledged 100 people.

   Within Republic I believe we should have at least 50. Every safety supervisor who is a voting member of NFPA should be there. We should make up any difference with new members. This must be done within *30 days* if they are to be registered in time to vote.

In addition:

- NEMA members plan to contact all steel companies, allied steel users and the Japanese conduit suppliers within the next two weeks urging them to add members and to be in Boston to vote.
- NEMA 5RN members themselves are going all out to have bodies on the floor to vote.
- All organization members favorable or non-committed to steel or plastics are being asked for their votes.
- Major work is to proceed within other allied organizations to gain every vote possible at the meetings. The attached criss-crossing list shows the inter-relationships involved.
- Fittings manufacturers are being asked to take part.

2. Develop all the information we can to factually present our case against the adoption of questioned sections of the code. This includes:
   - Crash testing to develop true merits of new products being sponsored by plastic companies for NEC adoption. (If we can get materials.)
   - Consolidation of main points from existing research defending steel position.
   - Preparation of information data sheets for use at the proper time to ask for votes for our positions.
   - Make every presentation possible to voting bodies and members seeking their votes before the meetings.
   - Get to everyone possible at the meetings to gain their votes through personal contact.
3. Consider and review possible legal action to stop certain proposals from being considered at the meeting.
   - All member companies are being asked to review legal implications of NFPA panel actions with their legal counsel. A unified legal approach is to be discussed in Chicago on March 11.
   - NFPA rules and procedures for the NEC voting are being cross-checked in writing with the NFPA for clarification.

Time is critical. It appears I'm acting as overall coordinator of activities, as Chairman of 5RN Codes & Standards.

The question to ask is—what is it worth to save our conduit business—as well as steel water pipe and certain markets for steel sheets?

We need at least 50 people from Republic to be in Boston to vote. This will cost up to $40,000. The special testing another $10,000 and the special literature another $10,000.

We thus need assurance of $60,000 for this campaign right now. The message can't be more urgent. Will you please move this on for top level involvement as quickly as possible. I'll be glad to supply more details.

Tuesday, the AISI Sub-Committee on Fire Technology will address this subject in even greater detail. I'll advise you of those results as soon as I return.

Sincerely,

/s/ R. E. TAYLOR
R. E. Taylor
Coordinator
Codes and Standards

RET/hs

Attachment

CC: Messrs. J. B. Anderson
J. D. Donohoe
R. Hennie
D. H. Kelly
D. W. Kelly
L. T. Young

BEST AVAILABLE COPY

Chart C

Key Influences Involved in Adoption of 1981 National Electrical Code Input To and Voting

Organizations:

National Electrical Manufacturers Assoc.

International Assoc. of Electrical Inspectors

ASHRAE

ASTM

Fire Marshals of North America

International Assoc. of Fire Chiefs

American Insurance Association

Society of Fire Protection Engineers

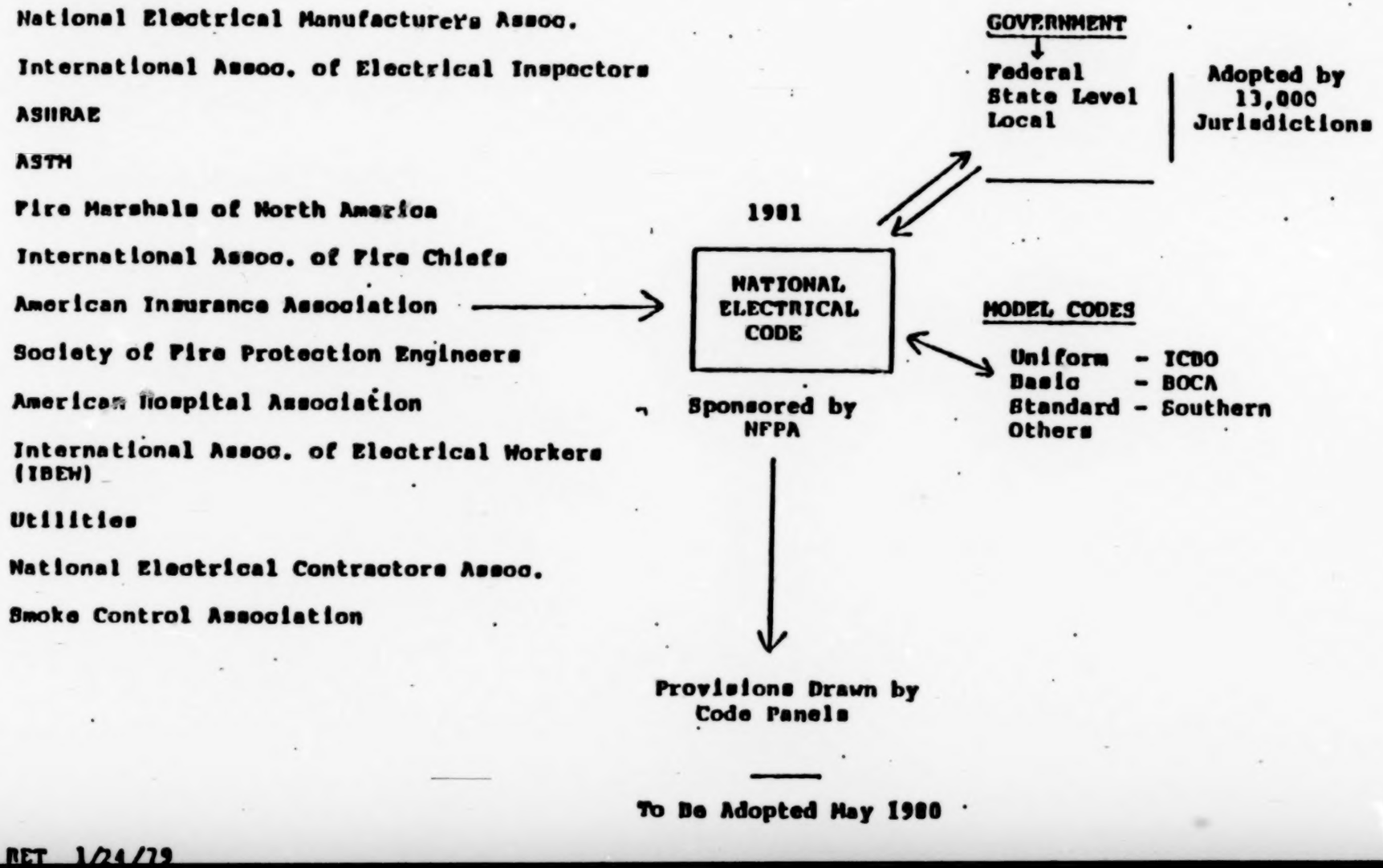
American Hospital Association

International Assoc. of Electrical Workers (IBEW)

Utilities

National Electrical Contractors Assoc.

Smoke Control Association



RET 1/24/79

ALLIED EXPENSES
MAY 1980 NFPA MEETING
AND ALLIED SALES MEETING

MEMBERSHIP FEES (155 members)	$7,698.00
MEETING REGISTRATION FEES (153+ attendees)	$9,210.00
FOOD AND LIQUOR EXPENSES	
Cocktail party, breakfasts, luncheons	$9,162.55
Employee meals	$ 984.96
Employee business meals and entertainment	$2,764.21
Box lunches	$ 736.25
Subtotal, Food and Liquor Expenses	$13,647,97
HOTEL/LODGING EXPENSES	$29,271.00
TRAVEL EXPENSES	
Agents' Airfare (47 agents)	$17,759.80
Agents' Automobile Expenses (1 agent)	$ 57.65
Employees' Airfare (58 employees)	$17,766.00
Subtotal, Travel Expenses	$35,583.45
OTHER EXPENSES	
Walkie-talkies	$ 340.00
Employee cab, bus and car fares	$1,319.27
Employee miscellaneous expenses	$1,038.50
Printing expenses (booklets)	$3,059.06
Subtotal, Other Expenses	$5,756.83
TOTAL	$101,167.25